INDIANA LAW REVIEW

INDIANA UNIVERSITY
SCHOOL OF LAW–INDIANAPOLIS
IUPUI

Volume 42 No. 2 2009

Indiana Law Review

Volume 42 2008-2009

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
Lawrence W. Inlow Hall
530 W. New York Street
Indianapolis, IN 46202-3225
(317) 274-4440

Subscriptions. Current subscription rates for an academic year are $30.00 (domestic mailing) and $35.00 (foreign mailing) for four issues. Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. ***Address changes must be received at least one month prior to publication to ensure prompt delivery and must include old and new address and the proper zip code.***

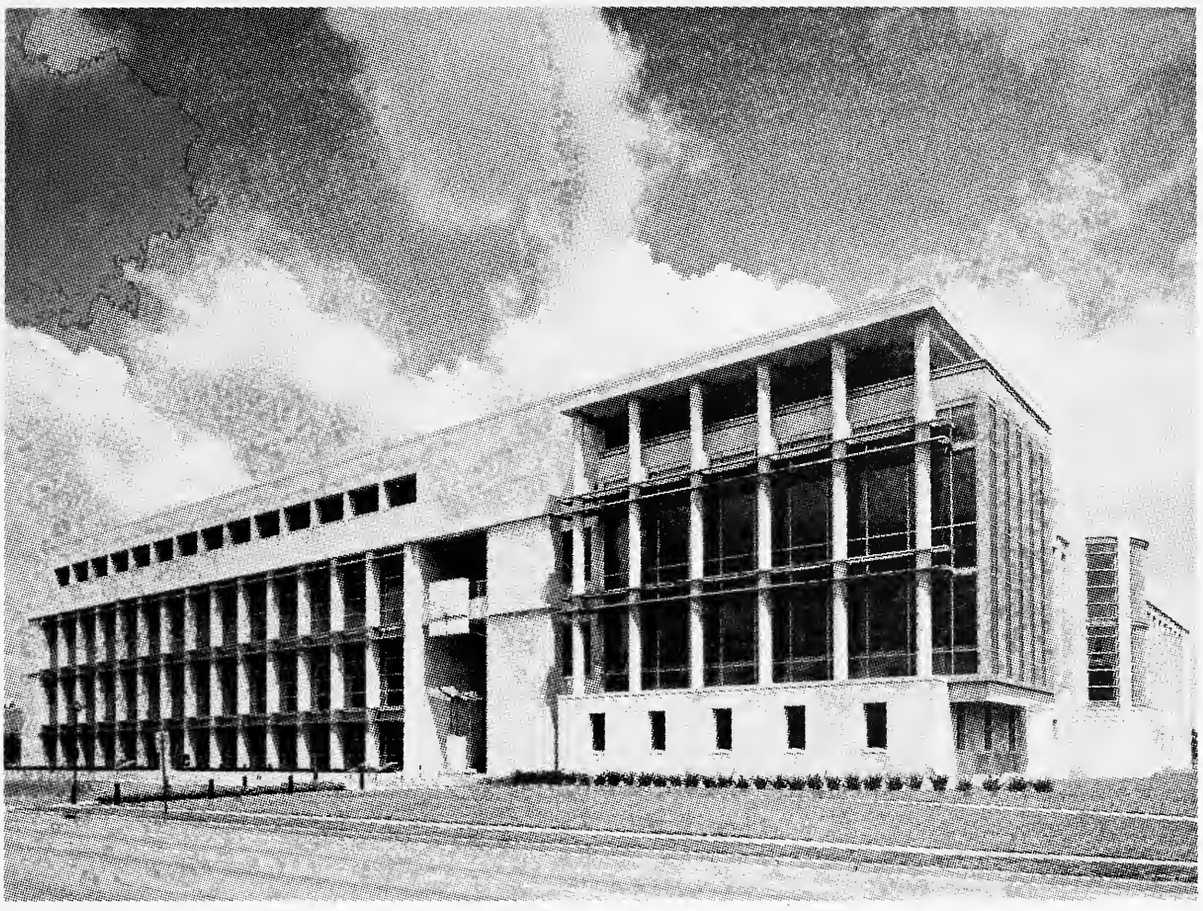
Single and Back Issues. Current single regular issues may be obtained from the *Indiana Law Review* Business Office for $10.00. Current Survey issues may be purchased for $20.00. The Symposium Issue may be purchased for $15.00. Please enclose payment with order. Claims for nonreceipt of current year's issues must be made within six months of the mailing date. Back issues may be ordered from: William S. Hein & Co., Inc., 1285 Main St., Buffalo, NY 14209-1987, (800) 828-7571, (716) 883-8100 fax, mail@wshein.com (e-mail for orders). Back issues are also available in an image-based format through HeinOnline, www.heinonline.org.

Manuscripts. The *Indiana Law Review* invites submission of unsolicited manuscripts. All citations should conform to *The Bluebook A Uniform System of Citation* (18th ed. 2005). Manuscripts should be double-spaced with standard one-inch margins. The *Indiana Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

The INDIANA LAW REVIEW (ISSN 0090-4198) is the property of Indiana University and is published quarterly by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility thereof. Current subscription rates for an academic year are: one year domestic $30.00; foreign $35.00. Send all correspondence to Editorial Specialist, *Indiana Law Review*, Indiana University School of Law—Indianapolis, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225. Publication office: 530 W. New York Street, Indianapolis, Indiana 46202-3225. Periodicals postage paid at Indianapolis, Indiana 46201.

POSTMASTER: Send address changes to INDIANA LAW REVIEW, Lawrence W. Inlow Hall, 530 W. New York Street, Indianapolis, Indiana 46202-3225.

The entire text of this Law Review is printed on recycled paper.



Please enter my subscription
to the
INDIANA LAW REVIEW

Name _____

Address _____

_____

_____

Enclosed is $_____ for _____ subscription(s)

Mail to: ATTN: Editorial Specialist
at
INDIANA LAW REVIEW
INDIANA UNIVERSITY SCHOOL OF LAW—INDIANAPOLIS
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana 46202-3225

For an *academic* year, the subscription rate for four issues is:
Domestic, $30; Foreign, $35; Student, $20

Single Issue, $10; Survey Issue $20
Symposium Issue, $15

Indiana International & Comparative Law Review

The *Indiana International & Comparative Law Review*, published by the Indiana University School of Law - Indianapolis since 1991, is a student-edited law journal that provides a forum for the discussion and analysis of contemporary issues in public and private international law. The *Review* publishes articles by prominent legal scholars, practitioners, and policy makers from around the world, as well as student-written notes and comments.

The *Review* is published twice annually, with a periodic third issue devoted to a specific topic in international or comparative law. In 1994, in conjunction with the Italian Academy for Advanced Studies in America at Columbia University, the *Review* published a special issue on the political and social aspects of Italian law. In 1996, the *Review* published an issue addressing various aspects of Chinese law.

_____

Name

_____

School/Firm/Business

_____

Address

_____

City, State, Zip Code

Subscriptions within the U.S. are $18.00 per year and outside the U.S. are $21.00 per year. I enclose $_____for_____subscription(s) to the *Indiana International & Comparative Law Review*. Please make your check payable to *Indiana International & Comparative Law Review*.

Mail to: Executive Production Editor
Indiana International & Comparative Law Review
Lawrence W. Inlow Hall
530 West New York Street
Indianapolis, Indiana 46202

Indiana University School of Law—Indianapolis

2008-2009 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

MICHAEL A. MCROBBIE, *President of the University.* Ph.D., Australian National University.

CHARLES R. BANTZ, *Chancellor, Indiana University-Purdue University—Indianapolis.* B.A., M.A., University of Minnesota; Ph.D., The Ohio State University.

GARY R. ROBERTS, *Dean and Gerald L. Bepko Professor of Law.* B.A., Bradley University; J.D., Stanford University.

PAUL N. COX, *Vice Dean and Centennial Professor of Law.* B.S., Utah State University; J.D., University of Utah; LL.M., University of Virginia.

ANGELA M. ESPADA, *Associate Dean for Student Services.* B.A., Indiana Central University; M.A., Indiana University; J.D., Indiana University School of Law—Bloomington.

MATTHEW J. BANKER, *Assistant Dean for Student Affairs.* B.A., University of St. Thomas (MN); J.D., Marquette University.

CLAIRE GROVE, *Assistant Dean for Graduate Studies.* B.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

JONNA KANE MACDOUGALL, *Assistant Dean for Institutional Advancement.* B.S., M.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

CHASTITY THOMPSON, *Assistant Dean Office of Professional Development.* A.S., B.A., Alabama State University; M.B.A., Auburn University; J.D., Indiana University School of Law— Indianapolis.

ELIZABETH ALLINGTON, *Director of External Affairs.* B.A., Indiana University; M.A., M. Phil., New York University.

TERESA (TERRI) J. CUELLAR, *Director of Technology Services.* B.S., St. Bonaventure University, New York.

JOYCE M. HERTKO, *Director of Major Gifts.* B.A., Knox College; M.S., Western Illinois University; Ph.D., Indiana University.

AMANDA KAMMAN, *Director of Development.* B.A., Indiana University.

PATRICIA K. KINNEY, *Director of Admissions.* B.S., Purdue University; J.D., Indiana University School of Law—Indianapolis.

VIRGINIA MARSCHAND, *Director of Administrative and Fiscal Affairs.* B.A., M.P.A., Indiana University; J.D., Indiana University School of Law—Indianapolis.

HEATHER MCCABE, *Director, Public Health Law Program, William S. and Christine S. Hall Center for Law and Health.* B.A., M.S.W., Indiana University; J.D., Indiana University School of Law—Indianapolis.

LAWANDA W. WARD, *Director of Pro Bono Program and Public Interest.* B.A., Murray State University; M.A., Illinois State University; M.S., Old Dominion University; J.D., Indiana University School of Law—Indianapolis.

Faculty

CYNTHIA M. ADAMS, *Clinical Professor of Law and Co-Director of the Latin American Law Program.* B.A., Kentucky Wesleyan College; J.D., Indiana University School of Law—Indianapolis.

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

CYNTHIA BAKER, *Clinical Associate Professor of Law and Director, Program on Law and State Government.* B.A., J.D., Valparaiso University.

GERALD L. BEPKO, *Indiana University-Purdue University—Indianapolis Chancellor Emeritus, Indiana University Trustee Professor and Professor of Law.* B.S., Northern Illinois University; J.D., ITT/Chicago-Kent College of Law; LL.M., Yale Law School.

SHAWN BOYNE, *Associate Professor of Law.* B.A., Cornell University; M.B.A., University of Minnesota, J.D., University of Southern California's Gould School of Law, M.A., University of Wisconsin, L.L.M., Justus-Liebig-Universtat.

KAREN E. BRAVO, *Associate Professor Law; John S. Grimes Fellow and Dean's Fellow.* B.A., The University of the West Indies; J.D., Columbia University School of Law; LL.M., New York University School of Law.

ROBERT BROOKINS, *Professor of Law.* B.S., University of South Florida; J.D., Ph.D., Cornell University.

KENNETH D. CHESTEK, *Clinical Associate Professor of Law.* B.A., Pennsylvania State University; J.D., University of Pittsburgh School of Law.

DANIEL H. COLE, *R. Bruce Townsend Professor of Law.* A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark Law School; J.S.M., J.S.D., Stanford Law School.

JEFFREY O. COOPER, *Associate Professor of Law.* A.B., Harvard University; J.D., University of Pennsylvania Law School.

PAUL N. COX, *Vice Dean and Centennial Professor of Law.* B.S., Utah State University; J.D., University of Utah College of Law; LL.M., University of Virginia School of Law.

ERIC DANNENMAIER, *Associate Professor of Law and Dean's Fellow.* B.A., Drury College; J.D., Boston University; LL.M., Columbia University; M. St., Oxford University.

JAMES D. DIMITRI, *Clinical Associate Professor of Law.* B.S., Indiana University; J.D., Valparaiso University School of Law.

JENNIFER ANN DROBAC, *Professor of Law and Director, Central and Eastern European Law Summer Program.* B.A., M.A., Stanford University; J.D., J.S.D., Stanford Law School.

GEORGE E. EDWARDS, *Carl M. Gray Professor of Law; Faculty Advisor to the L.L.M. track in International Human Rights Law; Director, Program in International Human Rights and John S. Grimes Fellow.* B.A., North Carolina State University; J.D., Harvard Law School.

FRANK EMMERT, *John S. Grimes Professor of Law and Executive Director, Center for International and Comparative Law.* Erstes Juristisches Staatsexamen (J.D.), University of Munich Law School; LL.M., The University of Michigan Law School; Ph.D., University of Maastricht; Diploma, European University Institute.

NICHOLAS GEORGAKOPOULOS, *Harold R. Woodard Professor of Law.* Ptyhion Nomikis, Athens University School of Law; LL.M., S.J.D., Harvard Law School.

JOHN LAWRENCE HILL, *Professor of Law; Adjunct Professor of Philosophy and John S. Grimes Fellow.* B.A., Northern Illinois University; J.D., Ph.D., Georgetown University.

LINDA KELLY HILL, *M. Dale Palmer Professor of Law.* B.A., J.D., University of Virginia.

MAX HUFFMAN, *Associate Professor of Law.* B.A., Cornell University, J.D., University of Chicago College of Law.

LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy.* A.B., Beloit College; J.D., M.B.A., The University of Michigan; LL.M., New York University School of Law.

ROBERT A. KATZ, *Professor of Law and John S. Grimes Fellow.* A.B., Harvard College; J.D., University of Chicago Law School.

ELEANOR D. KINNEY, *Hall Render Professor of Law, Co-Director of the William S. and Christine S. Hall Center for Law and Health.* B.A., Duke University; M.A., University of Chicago; J.D., Duke University School of Law; M.P.H., University of North Carolina.

ANDREW R. KLEIN, *Paul E. Beam Professor of Law.* B.A., University of Wisconsin; J.D., Emory University School of Law.

ROBERT E. LANCASTER, *Clinical Professor of Law, Director, Chinese Law Summer Program.* B.A., Millsaps College; J.D., Tulane Law School.

NORMAN LEFSTEIN, *Professor of Law and Dean Emeritus.* LL.B., University of Illinois College of Law; LL.M., Georgetown University Law School.

MARÍA PABÓN LÓPEZ, *Professor of Law; Co-Director, Latin American Law Summer Program. and Dean's Fellow.* B.A., Princeton University; J.D., University of Pennsylvania Law School.

GERARD N. MAGLIOCCA, *Professor of Law*; *Co-Director, Chinese Law Summer Program and John S. Grimes Fellow.* B.A., Stanford University; J.D., Yale Law School.

ALLISON MARTIN, *Clinical Associate Professor Law.* B.S., J.D., University of Illinois.

DEBORAH MCGREGOR, *Clinical Professor of Law and Assistant Director of Legal Analysis, Research and Communication.* B.A., University of Evansville; J.D., Georgetown University Law School.

SUSANAH M. MEAD, *Professor of Law.* B.A., Smith College; J.D., Indiana University School of Law—Indianapolis.

MARY H. MITCHELL, *Alan H. Cohen Professor of Law.* A.B., Butler University; J.D., Cornell Law School.

EMILY MORRIS, *Associate Professor of Law.* A.B., Harvard University, J.D., University of Michigan Law School.

NOVELLA NEDEFF, *Clinical Associate Professor of Law.* B.A., J.D., Indiana University.

JAMES P. NEHF, *Cleon H. Foust Fellow; Professor of Law and John S. Grimes Fellow.* B.A., Knox College; J.D., University of North Carolina Law School.

DAVID ORENTLICHER, *Samuel R. Rosen Professor of Law and Co-Director of the William S. and Christine S. Hall Center for Law and Health.* A.B., Brandeis University; J.D., M.D., Harvard College.

JOANNE ORR, *Clinical Professor of Law.* B.S., Indiana State University; J.D., California Western School of Law.

ANTONY PAGE, *Associate Professor of Law and Dean's Fellow.* B. Comm., McGill University; M.B.A., Simon Fraser University; J.D., Stanford Law School.

H. KATHLEEN PATCHEL, *Associate Professor of Law.* A.B., Huntington College; J.D., University of North Carolina Law School; LL.M., Yale Law School.

MICHAEL J. PITTS, *Associate Professor of Law; Dean's Fellow and John S. Grimes Fellow.* B.S.J., Northwestern University; J.D., Georgetown University Law Center.

FLORENCE WAGMAN ROISMAN, *William F. Harvey Professor of Law.* B.A., University of Connecticut; LL.B., Harvard Law School.

GARY R. ROBERTS, *Dean and Gerald L. Bepko Professor of Law.* B.A., Bradley University; J.D., Stanford University.

JOAN M. RUHTENBERG, *Professor of Law and Director of Legal Analysis, Research and Communication.* B.A., Mississippi University for Women; J.D., Indiana University School of Law—Indianapolis.

JOEL M. SCHUMM, *Clinical Professor of Law* and Director, Judicial Externship Program. B.A., Ohio Wesleyan University; M.A., University of Cincinnati; J.D., Indiana University School of Law—Indianapolis.

FRANCES WATSON, *Clinical Professor of Law.* B.S., Ball State University; J.D., Indiana University School of Law—Indianapolis.

LAWRENCE P. WILKINS, *William R. Neale Professor of Law.* B.A., The Ohio State University; J.D., Capital University Law School; LL.M., University of Texas School of Law.

LLOYD T. WILSON, JR., *Professor of Law and Co-Director, Chinese Law Summer Program.* B.A., Wabash College; M.A., Duke University; J.D., Indiana University School of Law—Bloomington.

MARY T. WOLF, *Clinical Professor of Law and Director of Clinical Programs.* B.A., Saint Xavier College; J.D., University of Iowa College of Law.

R. GEORGE WRIGHT, *Lawrence A. Jegen III Professor of Law.* A.B., University of Virginia; Ph.D., Indiana University; J.D., Indiana University School of Law—Indianapolis.

Emeriti Faculty

THOMAS B. ALLINGTON, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska; LL.M., New York University School of Law.

EDWARD P. ARCHER, *Professor of Law Emeritus.* B.M.E., Renesselaer Polytechnic Institute; J.D., LL.M., Georgetown University Law School.

JAMES F. BAILEY, III, *Professor of Law Emeritus and Director of the Law Library Emeritus.* A.B., J.D., M.A.L.S., The University of Michigan.

CLYDE HARRISON CROCKETT, *Professor of Law Emeritus.* A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).

DEBRA A. FALENDER, *Professor of Law Emerita.* A.B., Mount Holyoke College; J.D., Indiana University School of Law—Indianapolis.

DAVID A. FUNK, *Professor of Law Emeritus.* A.B., College of Wooster; J.D., Case Western Reserve University School of Law; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia Law School.

PAUL J. GALANTI, *Professor of Law Emeritus.* A.B., Bowdoin College; J.D., University of Chicago Law School.

HELEN P. GARFIELD, *Professor of Law Emerita.* B.S.J., Northwestern University; J.D., University of Colorado School of Law.

HAROLD GREENBERG, *Professor of Law Emeritus.* A.B., Temple University; J.D., University of Pennsylvania Law School.

JEFFREY W. GROVE, *Professor of Law Emeritus.* A.B., Juniata College; J.D., George Washington University Law School.

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law Emeritus.* A.B., University of Missouri; J.D., LL.M., Georgetown University Law School.

W. WILLIAM HODES, *Professor of Law Emeritus,* A.B., Harvard College; J.D., Rutgers University School of Law—Newark.

HENRY C. KARLSON, *Professor of Law.* A.B., J.D., LL.M., University of Illinois College of Law.

WILLIAM ANDREW KERR, *Professor of Law Emeritus.* A.B., West University; B.S., Duke University; J.D., LL.M., Harvard Law School.

WILLIAM E. MARSH, *Professor of Law Emeritus.* B.S., J.D., University of Nebraska.

RONALD W. POLSTON, *Professor of Law Emeritus.* B.S., Eastern Illinois University; LL.B., University of Illinois College of Law.

KENNETH M. STROUD, *Professor of Law Emeritus.* A.B., J.D., Indiana University—Bloomington.

JAMES W. TORKE, *Carl M. Gray Professor of Law Emeritus.* B.S., J.D., University of Wisconsin.

JAMES PATRICK WHITE, *Professor of Law Emeritus.* A.B., University of Iowa; J.D., LL.M., George Washington University Law School.

Law Library Faculty

JUDITH FORD ANSPACH, *Professor of Law and Director, Ruth Lilly Law Library.* B.S., M.L.S., Kent State University; J.D., Mississippi College School of Law.

SUSAN BOLAND, *Head of Information Services.* B.A., Monmouth College; M.S., University of Illinois; J.D., Illinois University College of Law.

DEBRA DENSLAW, *Reference Librarian.* B.A., Franklin College; M.S., University of Illinois, Urbana-Champaign; J.D., Valparaiso School of Law.

RICHARD HUMPHREY, *Reference Librarian.* A.A., Brewton-Parker Junior College; B.A., Georgia Southwestern College; M.L.S., University of Kentucky.

WENDELL E. JOHNTING, *Assistant Director for Technical Services.* A.B., Taylor University; M.L.S., Indiana University.

CHRIS E. LONG, *Cataloging Librarian.* B.A., Indiana University; M.A., Indiana University; M.L.S., Indiana University.

STEVEN R. MILLER, *Reference Librarian.* B.S., Lebanon Valley College of Pennsylvania; M.A., Dominican University; M.S., Northwestern University; J.D., The John Marshall Law School.

MAHNAZ K. MOSHFEGH, *Serials/Acquisitions Librarian.* B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.

MIRIAM A. MURPHY, *Associate Director.* B.A., Purdue University; J.D., M.L.S., Indiana University—Bloomington.

KIYOSHI OTSU, *Automated Services and Media Librarian.* A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.

Indiana Law Review

Volume 42 **2009** **Number 2**

TABLE OF CONTENTS

ARTICLE

PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

Education Reform and State Government: The Role of Tests, Expectations, Funding, and Failure

NOTES

Indiana Law Review

Volume 42 2009 Number 2

ARTICLE

OPTING ONLY IN: CONTRACTARIANS, WAIVER OF LIABILITY PROVISIONS, AND THE RACE TO THE BOTTOM

J. ROBERT BROWN, JR.*
SANDEEP GOPALAN**

ABSTRACT

This paper will test the core claim of scholars in the nexus of contracts tradition—that private ordering as a process of bargaining creates optimal rules. We do this by analyzing empirical evidence in the context of waiver of liability provisions. These provisions allow companies to eliminate monetary damages for breach of the duty of care through amendments to the articles of incorporation. With all states allowing some form of these provisions, they represent a good laboratory to examine the bargaining process between management and shareholders. The contractarian approach would suggest that shareholders negotiate with management to obtain agreements that are in their best interests. If a process of bargaining is at work as they claim, the opt-in process for waiver of liability provisions ought to generate a variety of approaches. Shareholders wanting a high degree of accountability would presumably not support a waiver of liability. In other instances, shareholders might favor them in order to attract or retain qualified managers. Still others would presumably want a mix, allowing waiver but only in specified circumstances.

Our analysis reveals that the diversity predicted by a private ordering model is not borne out by the evidence with waiver of liability provisions for Fortune 100 companies. All states permit such provisions and in the Fortune 100, all but one company has them. Moreover, they are remarkably similar in effect, waiving liability to the fullest extent

---

* Professor of Law, University of Denver Sturm College of Law. Professor Brown operates a blog that addresses corporate governance topics, The Race to the Bottom, http://www.theracetothebottom.org (last visited Oct. 14, 2008). Special thanks to Jamie Boyd, my research assistant, who put together all of the empirical data used in this paper. We are also grateful to Professor Doug Branson for his insightful comments and suggestions. Errors and omissions are our own.

** Reader (Associate Professor) in Law, University of Reading, United Kingdom. Professor Gopalan also contributes to the blog, The Race to the Bottom, http://www.theracetothebottom.org (last visited Oct. 14, 2008).

permitted by law. In other words, one categorical rule was merely replaced by another, dealing a significant blow to the contractarian thesis.

INTRODUCTION

The contractarian[1] strain of corporate law scholarship treats corporations as a nexus of contracts, allocating rights and obligations to the various constituencies that make up the legal fiction that is the firm.[2] It eschews a "one size fits all" approach to regulation and instead favors the use of enabling provisions that allow companies to opt in or opt out. Unlike categorical rules imposed by the state, market actors can engage in private ordering and bargain for the most efficient arrangements.[3] Contractarians argue that the state possesses no advantages vis-à-vis market actors in crafting rules of the game. To the extent that the state prescribes mandatory rules, they are likely to come with significant costs that could have been avoided had the parties been allowed to design their own rules.

Whatever the precise formulation of the view, contractarians, in the end, place an almost talismanic faith in private ordering and on the market as the final arbiter of efficiency. While private ordering will not ineluctably lead to greater efficiency, the market can be counted on to weed out the inefficient. In contrast, the inefficiencies arising from categorical rules are not susceptible to the same correction mechanism.

As a corollary to this approach, contractarians characterize the evolution of corporate law as a race to the top.[4] Under state law, categorical rules have

---

1. Professor Bebchuk prefers to label them "deregulators" writing that calling them contractarians implies that their arguments are rooted in "the contractual view of the corporation." Lucian Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1399 (1989) [hereinafter Bebchuk, *The Debate on Contractual Freedom*]. He points out that "deregulators do not have a monopoly over the contractual view." *Id.*

2. The "nexus of contracts" concept apparently is first alluded to in Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976) (noting a "nexus of a set of contracting relationships").

3. The rise of this view is generally traced to the University of Chicago and the law and economics movement. *See* Charles R.T. O'Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 755 (2006) ("Disciples of the Chicago School of Law and Economics controlled the agenda. Their swift rise to dominance coincided with the ascendancy in corporation law of a new hegemonic paradigm, founded on the view that the corporation is a nexus-of-contracts—a consensual ordering of relations generally to be governed by private ordering and not government regulation.").

4. *See* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 255-58 (1977). In an influential recent article, Professor Mark Roe refutes the state competition argument claiming that the possibility of federal intervention clouds a pure "race." *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 602-03 (2003).

gradually been replaced with enabling provisions, sometimes by transferring authority from shareholders to the board of directors, and sometimes through shareholder and board approval mechanisms. The system, therefore, allows companies to opt in or opt out of particular legal regimes, freeing managers to negotiate and engage in the most efficient arrangements.[5]

This Article examines an aspect of the contractarian approach to corporate law. The approach presupposes some ability of shareholders to "negotiate" with management to obtain agreements that are in the collective best interests of both groups. Presumably, the mechanism for asserting these interests in many cases is the ability to vote for or against a decision by management. This might occur, for example, where management can opt in or out of a regulatory regime through an amendment to the articles of incorporation. The need for shareholder approval would cause some companies not to seek the opt-in or opt-out authority and for others to limit the terms of the opt-in or opt-out regime in order to garner sufficient support. In other words, the regime would reflect "bargaining" between shareholders and management with the goal of achieving the most efficient relationship. If indeed some bargaining transpires between the competing interests, some degree of variance in practice would be expected.[6]

While bargaining between competing interests is plausible in theory, in reality the management domination of the approval process and the severe problems of collective action confronted by shareholders make it all but impossible.[7] As a result, the process of management submitting matters to shareholders cannot accurately be characterized as bargaining in any meaningful sense of the term. It is management that drafts the proposal, management that has the authority to initiate the proposal, management that decides the most propitious moment to put forth the proposal, and management that has the corporate treasury at its disposal to ensure adoption of the proposal. Moreover, once passed, shareholders typically lack the authority to initiate repeal.[8] The consequences are stark: once management obtains adoption, the provision remains in place, irrespective of the wishes of shareholders, until management decides to initiate a change.

This Article examines whether the core claim of contractarians—that private ordering as a process of bargaining creates optimal rules—is borne out by the empirical evidence in the context of waiver of liability provisions. These

---

5. *See* Bebchuk, *The Debate on Contractual Freedom*, *supra* note 1, at 1397 ("The primary function of corporate law, they suggest, should be to facilitate the private contracting process by providing a set of nonmandatory 'standard-form' provisions, with private parties free to adopt charter provisions that opt out of any of these standard arrangements.").

6. This is not to say that an efficient result that applies equally to all companies and all kinds of shareholders and managements should not be replicated in all companies. But for this to happen, it must be shown that the uniform result is the most efficient arrangement possible in all or most situations. If such a uniformly efficient arrangement cannot be crafted, variance is inevitable.

7. Bebchuk, *The Debate on Contractual Freedom*, *supra* note 1, at 1411-12.

8. Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 835, 836 (2005).

provisions allow companies to eliminate monetary damages for breach of the duty of care through amendments to the articles of incorporation.[9] With all states allowing some form of these provisions, they represent a good laboratory to examine the bargaining process between management and shareholders.[10]

The choice of waiver of liability provisions for study is particularly appropriate because they exemplify a contractarian approach to regulation. They were a reaction to purported problems created by a mandatory approach and allowed companies to opt out of a regime that imposed liability on managers for breach of the duty of care.[11] Moreover, as amendments to the articles, they require the assent of both managers and owners. The outcome, therefore, presumably results from negotiations between these two groups and ought to be a good example of private ordering by contract.

If a process of bargaining is at work as the contractarians claim, then the opt-in process for waiver of liability provisions ought to generate a variety of approaches. Shareholders wanting a high degree of accountability would presumably not support a waiver of damages. In other instances, shareholders might favor them in order to attract or retain qualified managers. Still other shareholders would presumably want a mix, allowing waivers only in specified circumstances.

In fact, as the analysis shows, none of the diversity predicted by a private ordering model appears in connection with waiver of liability provisions. They are permitted by every state and are used by all but one Fortune 100 company.[12] Moreover, they are remarkably similar in effect, waiving liability to the fullest extent permitted by law. In other words, one categorical rule was merely replaced by another, with no evidence that a categorical waiver of liability was any more efficient than a categorical rule imposing liability. At the same time, the change benefited management, suggesting that the motivation was not efficiency but self-interest of one of the groups involved. Moreover, whatever one might think about the benefits of private ordering and bargaining, the evidence suggests that it is not taking place in the waiver of liability context.

This Article briefly reviews the position of contractarians in the debate on the evolution of corporate law. The Article then examines the impetus for waiver of liability provisions which, contrary to claims, was not from the excesses of *Smith*

---

9. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2006 & Supp. 2009).

10. Delaware originated the opt-in model, whereby companies could reduce liability by affirmatively amending their articles of incorporation. Indiana, some months earlier, adopted the first opt-out model, whereby the statute eliminated monetary damages for grossly negligent behavior by the board of directors but allowed companies to opt out of the regime in their articles of incorporation. *See* Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 221-22 (2006) [hereinafter Romano, *The States as a Laboratory*].

11. Smith v. Van Gorkom, 488 A.2d 858, 893, 898 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009).

12. *See* Appendix, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088414 (follow "download" hyperlink at top of page).

v. Van Gorkom[13] but from a disguised attempt to pass along some of the costs of Directors and Officers' (D&O) insurance to shareholders. Thereafter the Article analyzes the waiver provisions actually adopted by the Fortune 100 to determine whether the variance predicted by the bargaining model has occurred. Finally, the piece ends with some observations and identifies some of the reforms necessary to implement a private ordering model.

I. A BRIEF EXEGESIS ON THE NEXUS OF CONTRACTS AND THE RACE TO THE BOTTOM

A widespread view in the academy is that corporations are best analyzed as a "nexus of contracts."[14] As Professor Eisenberg notes, "[u]nder the nexus-of-contracts conception, the body of shareholders is not conceived to own the corporation. Rather, shareholders are conceived to have only contractual claims against the corporation."[15] The corporation is created by a "nexus of reciprocal arrangements,"[16] and the role of the law should be to facilitate this contracting process.[17] Managers, owners, and others bargain for the most efficient relationships, which are ones that uniquely reflect the interests of the particular parties involved.

While recognizing that managers have self-interested motivations to pursue their aims at the expense of the shareholders, contractarians rely on the "invisible hand" to constrain such behavior.[18] Investors will punish self-interested behavior

---

13. 488 A.2d 858 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009).

14. William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 409 (1989). For a critical view, see Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1407-10 (1985).

15. Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819, 825 (1999).

16. *Id.* at 822. Professor Eisenberg writes that

> the nexus-of-contracts conception . . . neither can nor does mean what it literally says. In ordinary language, the term contract means an agreement. In law, the term means a legally enforceable promise. Pretty clearly, however, the nexus-of-contracts conception does not mean either that the corporation is a nexus of agreements or that it is a nexus of legally enforceable promises.

Id.

17. Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) [hereinafter Easterbrook & Fischel, *The Corporate Contract*] ("The corporation is a complex set of explicit and implicit contracts, and corporate law enables the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy. No one set of terms will be best for all; hence the 'enabling' structure of corporate law.").

18. *Id.* at 1419 ("Managers may do their best to take advantage of their investors, but they find that the dynamics of the market drive them to act as if they had investors' interests at heart. It is almost as if there were an invisible hand.").

by discounting the securities issued by those companies, thus presenting an effective incentive for managers to act in ways that maximize shareholder welfare.[19] Over a period of time companies having poor governance arrangements will be weeded out by the market, and those exhibiting optimal arrangements will thrive.[20] Contractarians, therefore, favor enabling provisions where parties can opt-in or opt-out and eschew the one-size-fits-all approach of categorical rules.[21] Corporate law, in this framework, should merely provide a set of default rules.[22]

The opposition to categorical rules has influenced the view of contractarians on the evolution of corporate law. The paradigmatic example is Delaware —where companies choose to incorporate there because of its expert judiciary,[23] sophisticated bar,[24] and a commitment to maintaining a climate for private ordering.[25] Contractarians view corporate law as a good that states are competing to supply and that companies choose because of the efficiency of the legal regimes offered. They characterize the predominance of companies incorporated in Delaware as a race to the top[26] rather than to the bottom.[27]

---

19. *See id.*

20. *Id.*

21. *See generally* Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599 (1989); E. Norman Veasey, *The Stockholder Franchise is Not a Myth: A Response to Professor Bebchuk*, 93 VA. L. REV. 811, 825 (2007).

22. Easterbrook & Fischel, *The Corporate Contract*, *supra* note 17, at 1444-45. This begs the question as to why parties could not come up with their own arrangements in the absence of any demonstrably unique advantages that the state enjoyed in crafting such rules. Default rules could be crafted by private parties themselves. All that is required for the elimination of repeat drafting cost is that one party (or an industry group) publishes its draft, which can then be copied by all other parties to the extent that they are efficient. If corporate law's function is only to supply default rules, it would seem that it is of very little relevance. This would hardly explain the enormous expenditure of resources by state agencies in crafting them or of contractarians in studying them.

23. Veasey, *supra* note 21, at 817 (noting "Delaware's enabling statutory model, with a unique overlay of expert judicial case law").

24. *See id.*

25. This view was excoriated by William Cary over three decades ago, but it has been perniciously hard to displace. *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 701 (1974) ("[A] pygmy among the 50 states prescribes, interprets, and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders, thereby increasing its revenue.").

26. *See* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 919-20 (1982); Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL'Y 127, 129 (1982).

27. There tends to be an all or nothing approach in discussing this issue. A race to the bottom may explain some corporate law reforms but certainly not all. *See generally* J. Robert Brown, Jr., *The Irrelevance of State Corporate Law in the Governance of Public Companies*, 38 U. RICH. L.

With evidence mounting that Delaware's legislature was captured by management interests,[28] the race to the top theory has taken a beating.[29] The pro-management capture, has, for obvious reasons, maintained Delaware's preeminent position as the supplier of corporate law, despite copycat legislation from other states.[30] With Delaware resolutely engaging in an almost continuous process of eliminating categorical rules,[31] the opportunities for private ordering have increased, and corporate law has inexorably moved away from the mandatory approach.[32]

For a time, contractarians comfortably took an uncompromising view on the need for, and benefits from, enabling provisions.[33] Private ordering did not always have to result in a more efficient arrangement so long as the market stood poised to weed out those that were inefficient.[34] The contractarian universe

---

REV. 317 (2004) [hereinafter Brown, *The Irrelevance of State Corporate Law*]; Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526 (1989).

28. Delaware benefits financially from its pro-management bias. *See* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1753-54 (2006). Professor Hamermesh writes that "[r]evenue from the state corporate franchise tax alone has in recent years constituted over twenty percent of the state's budget, a fact of which Delaware legislators are intensely aware." *Id.*

29. *See* William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861, 1925-48 (1995); Roberta S. Karmel, *Is it Time for a Federal Corporation Law?*, 57 BROOK. L. REV. 55, 91-96 (1991).

30. One theory suggests that Delaware courts create indeterminacy in their case law as a strategic choice to make it difficult for other states to copy, which explains why it is not possible for other states to effectively compete with it. *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1927-28 (1998); *see also* Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 112 (1990).

31. See the article by Delaware Chancellor William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1400 (1993) (noting that the contractarian model is now the "dominant legal academic view"). The best example may be the elimination of the prohibition on discriminating among shareholders of the same class. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985). Delaware was the first state to permit companies, in their charter, to waive liability for directors. For the international perspective on this, see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD PRINCIPLES OF CORPORATE GOVERNANCE 20 (2004), *available at* http://www.oecd.org/dataoecd/32/18/31557724.pdf ("All shareholders of the same series of a class should be treated equally.").

32. Some have taken the position that the state law requirements are largely enabling, with the remaining categorical rules "trivial." *See generally* Bernard S. Black, *Legal Theory: Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1990).

33. Contractarians relied upon the market, specifically hostile takeovers, for corporate control. For a criticism of this reliance, see generally J. Robert Brown, Jr., *In Defense of Management Buyouts*, 65 TUL. L. REV. 57 (1990).

34. Thus, even fiduciary duties should be subject to private ordering. *See* Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65

posited that those entering into inefficient arrangements would be penalized by the market through lower share prices.[35] The market for corporate control,[36] specifically hostile takeovers, would ensure that inefficient managers would be eliminated.[37] Thus, irrespective of the number of inefficient arrangements, only the efficient would survive.

The view was always simplistic. But in any event, the mechanism can no longer be relied upon to police the efficiency of arrangements arising out of private ordering. Hostile tender offers have disappeared from the landscape.[38] No longer able to show the ineluctable elimination of inefficient bargains, contractarians were forced to argue that the enabling approach in Delaware somehow resulted in greater aggregate efficiency. That is, while conceding that some managers and owners enter into inefficient arrangements, arrangements that would not necessarily be eliminated by market forces, the enabling approach, in the aggregate, produced more efficient behavior.[39]

There is little evidence to support this sweeping conclusion. Some contractarians have pointed to a handful of event studies purporting to show that share prices increased upon reincorporation in Delaware.[40] This ostensibly

---

WASH. L. REV. 1, 32 (1990) [hereinafter Butler & Ribstein, *Opting Out of Fiduciary Duties*] (stating that "the fundamentally contractual nature of fiduciary duties means that they should be subject to the same presumption in favor of private ordering that applies to other contracts").

35. *See generally* Brown, *supra* note 33.

36. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112-14 (1965).

37. Of course, there is one substantial exception: contractarians did not favor broad managerial discretion in the area of antitakover tactics. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1201-03 (1981).

38. Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168, 1177-78 (1999) [hereinafter Bebchuk & Ferrell, *Federalism and Corporate Law*]; Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 890-91 (2002) [hereinafter Bebchuk et al., *The Powerful Antitakeover Force*].

39. Bebchuk et al., *The Powerful Antitakeover Force*, *supra* note 38, at 890-91.

40. *See* Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775, 1781 (2002) [hereinafter Bebchuk et al., *Does the Evidence Favor State Competition*]. Some scholars attempt to show that particular categories of issuers benefit from incorporation in Delaware. For example, they argue that IPOs of Delaware companies receive increased valuation. *See* Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1571-72 (2002). But if it were that clear that incorporating in Delaware improved shares prices, all similarly situated companies would do so, and they do not. *See* Bebchuk et al., *Does the Evidence Favor State Competition*, *supra*, at 1789 ("While Daines's study makes an impressive effort to control for as many parameters as possible, including type of business and firm size, it nonetheless remains true that if in a group of seemingly identical firms, some firms incorporate in Delaware and others do not, there must be omitted variables that produce this differential behavior. This is all the more true if it is supposed that one choice produces a

represented the market's judgment that Delaware's law was more efficient than the alternatives.[41] The studies, however, do not make a strong case. The results are inconsistent[42] and focus on short term results.[43] They do not offer a view on the long term impact.[44] They also conflict with the facts on the ground. To the extent re-incorporation results in a predictable increase in share prices, the impetus for engaging in the transaction ought to come from financial experts. In fact, the literature indicates that re-incorporations were promoted by lawyers, not investment bankers.[45] Finally, corporate law reform often has managerial self-interest at its core rather, than efficiency.[46]

The debate over enabling versus categorical rules surfaced with a vengeance in the commentary surrounding the adoption of the Sarbanes-Oxley Act of 2002 (the Act) providing a judgment of sorts on the approach.[47] The Act summarily rejected the contractarian approach, adopting a host of categorical rules.[48] The

---

substantial increase in firm value and the other does not.").

41. William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 327-29 (1997).

42. *See* Bebchuk et al., *Does the Evidence Favor State Competition*, *supra* note 40, at 1791-92 ("These six studies . . . present a rather mixed picture. Roberta Romano's study, the earliest and most influential of the six, found a positive abnormal return of 4.18%. However, three of the subsequent five studies found abnormal returns in the vicinity of 1%, and two of the subsequent five studies, including the most recent event study which used the largest sample size, did not find an abnormal return that differed from zero in a statistically significant way.") (footnotes omitted).

43. *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2384 n.76 (1998) [hereinafter Romano, *Empowering Investors*].

44. *Id.* Similarly, during the takeover era, the tendency was to note the short term value of acquisitions to the bidder (generally neutral) without attempting to assess the longer term impact. *See* Brown, *supra* note 33, at 87.

45. *See* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472 (1987) (stating that "the rules that Delaware supplies often can be viewed as attempts to maximize revenues to the bar, and more particularly to an elite cadre of Wilmington lawyers who practice corporate law in the state").

46. Not all corporate law reforms are explainable as a product of the race to the bottom. *See generally* Brown, *The Irrelevance of State Corporate Law*, *supra* note 27. One reform that is explainable, however, is the widespread adoption of waiver of liability provisions. These provisions benefit management by including in the articles, a provision that eliminates monetary damages for breach of the duty of care. Nonetheless, in the last twenty years, a remarkably short period of time for legal reform, all fifty states put some type of reduced liability provision in place. While a possible example of "private ordering," these provisions have become ubiquitous, suggesting that they are not in fact a result of individual negotiation. Moreover, even if a waiver were necessary to attract the most efficient management in a particular case, the provision applied to all subsequent managers. Thus, these provisions essentially result in shareholders indefinitely ceding away damages for mismanagement irrespective of the particular management involved.

47. Sarbanes-Oxley Act of 2003, 15 U.S.C. §§ 7201-7266 (2006). The Act preempts a number of state law provisions and imposes a series of mandatory requirements.

48. *See generally* J. Robert Brown, Jr., *Criticizing the Critics: Sarbanes-Oxley and Quack*

response was a fusillade of criticism and invective, with at least one scholar labeling the Act "quack corporate governance,"[49] a judgment offered hardly before the ink was dry.[50] Yet as the stock market hit record highs and the number of fraud actions fell, the evidence suggested that the categorical approach in fact improved the integrity of the capital markets.[51]

But the contractarian approach had an even greater fundamental problem in that it simply assumed the conditions necessary for private ordering. Proponents had little to say about the disparate bargaining positions of managers and owners, the problems of collective action and, most critically, the management's monopoly to initiate the process of, or changes to, the opt–in or opt-out process.[52] In other words, the opt-in or opt-out provisions did not allow private ordering.[53]

II. PRIVATE ORDERING AND WAIVER OF LIABILITY PROVISIONS

A. Overview

Delaware became the first state to adopt an "opt-in" approach to waivers of liability in 1986.[54] The provision allowed companies to insert into their articles of incorporation provisions that waived monetary damages for breaches of the duty of care.[55] These provisions had to be approved by both directors and shareholders, presumably giving rise to a bargaining process.

Corporate Governance, 90 MARQ. L. REV. 309 (2006).

49. *See generally* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005).

50. These criticisms are discussed and largely dismissed. Brown, *supra* note 48, at 309.

51. *See* Stanford Law School Securities Class Action Clearinghouse, http://securities.stanford.edu/ (last visited Feb. 25, 2009) (reporting a ten-year low in the number of securities fraud suits brought in 2006). The number of suits increased in 2007 but still represented the third lowest total since the adoption of the Private Securities Litigation Reform Act (PSLRA) in 1995. *Id.*

52. *See* Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489, 492 (2002) [hereinafter Bebchuk & Hamdani, *Optimal Defaults*] ("To be sure, a charter amendment requires a vote of shareholder approval. Such votes, however, take place only on amendments initiated by management. Management thus has an effective veto power over charter amendments. As a result, for any level of shareholder support, corporations are much more likely to adopt amendments management favors than amendments management disfavors.").

53. This may be a result of what Professor Bebchuk calls "network externalities." Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 890 (2005).

> It is advantageous for a company to offer an arrangement that is familiar to institutional investors, that facilitates pricing relative to other companies, that is backed by a developed body of precedents and judges familiar with the arrangement. Conversely, companies are discouraged from adopting arrangements that are unconventional and radically different from those in other companies.

Id.

54. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2006 & Supp. 2009).

55. *See id.*

The provisions replaced a categorical rule with an enabling provision, the very sort of arrangements contractarians favor.[56] Enabling provisions permitted private ordering, facilitating greater efficiency.[57] By requiring shareholder and management approval, the contractarian thesis would predict a multitude of variations in waiver of liability provisions, each designed to promote efficiency.[58]

As the data shows, these "benefits" have not materialized. There has been no evidence of bargaining and no evidence of true private ordering. Instead, one categorical rule has merely replaced another. In other words, the empirical evidence shows implementation of a "one-size-fits-all" approach, the very thing that contractarians vehemently oppose.[59] The only difference is that the new

---

56. Ann E. Conaway Stilson, *Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors*, 20 DEL. J. CORP. L. 1, 7 n.16 (1995) ("Accordingly, contractarians support enforcement of corporate provisions which eliminate or restrict managerial duties and liabilities."); *see also* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1781-82 (2001).

57. *See* Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 776 (1989) [hereinafter Butler & Ribstein, *The Contract Clause*] ("Corporate terms are, in fact, efficiently priced in these markets. It follows that improving the terms of a corporate contract—by adding or deleting fiduciary duties where appropriate—will positively affect the price of the corporation's securities. This gives a control purchaser the opportunity to profit by changing the terms of the contract.").

58. As Roberta Romano has said:

> State law is an enabling approach. It is a set of default rules. Sometimes firms opt out of them and sometimes they opt in, and I think that reflects the essential variation in firms about what they think is the best governance structure, the best Board of Directors for each firm, so we tailor it.

Transcript of Roundtable Discussions Regarding the Federal Proxy Rules and State Corporation Law at 26, Securities and Exchange Commission (2007), *available at* http://www.sec.gov/spotlight/proxyprocess/proxy-transcript050707.pdf; *see also* Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1272 (1999) ("Stated another way, from a nexus-of-contracts perspective, because firms consist of a complex web of contractual relationships, firm behavior depends critically on what those contracts provide. In turn, the contract provisions themselves depend on the outcome of the bargaining process that takes place between the contracting parties.").

59. The numbers here are too great to cite thoroughly. Suffice it to say that it is the view of Stephen Bainbridge at UCLA. *See* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 891 n.177 (1997) (book review) ("As such, a one-size-fits-all state-sanctioned code of behavior cannot fit everyone and may not fit anyone."); Stephen M. Bainbridge, *Corporate Decisionmaking and the Moral Rights of Employees: Participatory Management and Natural Law*, 43 VILL. L. REV. 741, 775 (1998) ("As a result, legislative action is likely to take on a one-size-fits-all approach, which in turn is unlikely to fit anyone."); *see also* Henry N. Butler, Smith v. Van Gorkom, *Jurisdictional Competition, and the Role of Random Mutations in the Evolution of*

categorical rule favors managers over shareholders.

Further, it is arguable that the waiver of liability provision is not in the nature of a default rule at all. As Professor Eisenberg notes, "[t]he standard methodology for establishing the content of a default rule is that the rule should have the content that the affected parties would have agreed upon if they had costlessly negotiated on the matter."[60] If this is indeed the test of a default rule, it would be strange to suppose that shareholders would negotiate with management to absolve directors of liability for breaches of their fiduciary duties. If the rule was that directors were personally liable for breaches of the duty of care, but the more efficient rule was that they should not be personally liable, the parties would contract around the rule to reach a more efficient outcome. Bargaining around the rule can only occur when transaction costs are low. If the transaction costs are high, then the parties would be forced to live with the inefficient categorical rule imposing personal liability. In such scenarios, a default rule absolving directors of personal liability would make sense.

Would such a rule be more efficient? Shareholders would sue directors individually or jointly, and shareholders could elect to sue those with the deepest pockets. These directors would have to sue the others for contribution. In this circumstance, individuals with significant personal resources would decline directorships so the board would be comprised of individuals with little or nothing at stake, possibly even by individuals who are in serious debt. Personal liability is of little avail because a successful shareholder would collect nothing. Furthermore, if personal liability were the rule, even good candidates who are mired in debt might shirk directorships, which would uninjure shareholders by forcing them to accept less than ideal candidates as directors.

Waiver of liability is clearly not the only option. It is entirely possible to externalize some of these risks—whether it is by insurance, limitations of liability, or selective waivers. If true bargaining was at work, one would expect to see a range of these outcomes, with the most efficient being replicated. What we have, instead, is waiver of liability to the fullest extent allowed by the law.[61] This leads to the conclusion that the provisions are pro-management categorical rules, rather than efficient default rules that the parties themselves might have designed had they been negotiating with low contracting costs. It is curious that contractarians have no problem with categorical rules when they are pro-management.

There is not any evidence that the new categorical rule results in greater efficiency. The provision was adopted not because of the reasoning in *Smith v. Van Gorkom*,[62] at least not overtly. Instead, the perceived "crisis" in D&O

Corporate Law, 45 WASHBURN L.J. 267, 277 (2006); Butler & Ribstein, *Opting Out of Fiduciary Duties*, *supra* note 34, at 46; Romano, *Empowering Investors*, *supra* note 43, at 2427-28.

60. Eisenberg, *supra* note 15, at 833.

61. *See, e.g.*, Dell Inc., Restated Certificate of Incorporation, http://public.thecorporatelibrary.net/charters/cha_ 13349.htm (last visited Mar. 9, 2009).

62. 488 A.2d 858 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695, 713 n.54 (De. 2009).

insurance, something that was well in process long before the court opted to enforce the duty of care, induced the change. In other words, the ostensible reason for waiver of liability provisions was to intervene in the market for D&O insurance, presumably to lower the costs. There was no evidence that the approach taken by the Delaware legislature was necessary, would have any significant impact on the market for D&O insurance, or was likely to result in greater efficiency than allowing for the inevitable market correction. In fact, almost as the ink dried on the legislation, the D&O "crisis" ended.[63] At the same time, while having little or no impact on D&O insurance, the provisions benefited managers by reducing their exposure to liability.

B. Waiver of Liability: An Exegesis

D&O insurance had, by the 1980s, become a fixture in the corporate board room. As the decade opened, however, a "crisis" occurred.[64] In renewing their policies, companies often found that the costs had risen sharply, the exclusions had increased, and the amount of coverage was reduced.[65] There were various reasons for the crisis, including traditional cycles that affected all types of commercial insurance.[66]

---

63. Even Romano acknowledges that by "late 1987, the D & O insurance market was no longer in turmoil." Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1156 (1990) [hereinafter Romano, *Corporate Governance*].

64. Some have questioned whether "crisis" is an appropriate term, at least with respect to the allegations that the shifts in the insurance market affected the pool of qualified candidates willing to serve on the board. *See* Elizabeth A. Nowicki, *Not in Good Faith*, 60 SMU L. REV. 441, 478-79 (2007).

65. *See* Dennis J. Block et al., *Advising Directors on the D&O Insurance Crisis*, 14 SEC. REG. L.J. 130, 130-31 (1986) ("The market for directors and officers . . . liability insurance is currently is in a state of crisis. Premiums are skyrocketing, deductibles are increasing at an extraordinary rate, coverage is shrinking, and more and more insurance companies are terminating their D&O programs. At the same time, policy durations are becoming shorter, and the policies themselves have an increasing number of exclusions.") (footnotes omitted); *see also* Michael D. Sousa, *Making Sense of the Bramble-Filled Thicket: The "Insured vs. Insured" Exclusion in the Bankruptcy Context*, 23 EMORY BANKR. DEV. J. 365, 375 (2007) ("For example, 50% of the corporate respondents to a survey released in 1987 and conducted by the actuarial and insurance consulting firm the Wyatt Company reported that their directors and officers liability insurance premiums had been recently increased by 300% or more; 27% of the respondents reported deductibles increased by 300% or more; and 27% of the respondents reported that their maximum coverage had been reduced by 50% or more.").

66. In hindsight, it is clear that the insurance market goes through periodic boom and bust cycles, and a bust cycle occurred during this time period. *See* Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 507 (2007) ("The D&O insurance market went through this 'hard' phase in the mid-1980s and again in 2001-2003. More recently, the D&O insurance market has been shifting to the 'soft' phase.") (footnotes omitted). These boom and bust cycles are "correlated" with other business cycles. *Id.* at 506.

One development that did not explain the "crisis," however, was the Delaware Supreme Court's decision in *Van Gorkom*. For much of this century, the duty of care in Delaware led, what one commentator labeled, a "humble existence."[67] However, "comatose" was perhaps a more apt description. Delaware courts simply did not find violations of the duty of care. Directors confronted little or no risk of liability for ordinary business decisions. Only suits alleging conflicts of interest had any realistic hope of success.[68]

This placid state of affairs was disrupted by the Delaware Supreme Court's decision in *Smith v. Van Gorkom*.[69] The court found the business judgment rule inapplicable to an "uninformed" board.[70] The directors found themselves in the unusual position of having to show the fairness of the transaction in which they received no personal benefit. The case ultimately settled for more than $23 million,[71] an amount paid not by the directors but by Jay Pritzker, the acquirer, and the D&O insurance policy.[72]

---

67. Stephen J. Lubben & Alana Darnell, *Delaware's Duty of Care*, 31 DEL. J. CORP. L. 589, 590 (2006).

68. Delaware courts are still unwilling to find violations of the duty of care. In the period 1980 until 2004, research uncovered only five derivative and twelve direct actions against outside directors that went to trial. Bernard Black et al., *Outside Director Liability*, 58 STAN. L. REV. 1055, 1064-66 (2006).

69. 488 A.2d 858 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009).

70. *Id.* at 889. The directors of Trans Union appeared beholden and under the influence of Van Gorkom, who wanted the merger approved so that he could sell his interest before retiring. *See id.* at 865-66, 869. The case was not brought under the duty of loyalty because Van Gorkom got a benefit shared by the other stockholders, a Delaware crafted exception. *Id.* at 872-73. As two commentators noted before the case was decided, "courts have proven remarkably reluctant to impose liability where no element of self-dealing or personal benefit was present." John C. Coffee, Jr. & Donald E. Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 317 (1981).

71. *See* Stephen A. Radin, *The Director's Duty of Care Three Years After* Smith v. Van Gorkom, 39 HASTINGS L.J. 707, 719 (1988) ("The court accordingly remanded the case for a determination of the fair value of the Trans Union shares at the time of the board's decision, and for an award of damages to the extent that the fair value exceeded $55 per share. The case was settled prior to such a determination for $23.5 million, amounting to approximately $1.87 per share. The settlement was conditioned upon a $10 million payment by either Trans Union's or the individual directors' insurance carrier; most of the remaining $13.5 million was contributed by the Pritzker company that had acquired Trans Union.") (footnotes omitted).

72. *Id.*; *see also* Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom after* Van Gorkom, 41 BUS. LAW. 1, 1 n.a1 (1985) (editor's note) ("[A]n agreement was reached to settle the Van Gorkom litigation by the payment of $23.5 million to the plaintiff class. Of that amount, a reported $10 million, the policy limit, is to be provided by Trans Union's directors and officers liability insurance carrier. Although the group which acquired Trans Union in the disputed acquisition was not a defendant, according to a newspaper account nearly all of the $13.5 million balance will be paid by the acquiring group on behalf of the Trans Union defendant directors.");

The decision drew an outcry from corporate America[73] and fueled loud criticism.[74] Some complained that the case applied a negligence rather than gross negligence standard, a characterization hard to justify on the facts.[75] Others saw dire consequences, asserting that qualified persons would be unwilling to serve as directors of public companies.[76] Law and economics scholars denounced the categorical nature of the decision.[77]

In fact, the criticisms were overwrought. There was little chance that *Van Gorkom* would presage a broad reexamination of, or change in, the duties of directors. For one thing, the case was decided by a 3-2 margin,[78] a departure from the usual display of unanimity in fiduciary duty cases. For another, the case involved a pseudo-loyalty claim, which perhaps explained the heightened scrutiny.[79] Third, the threatened uncertainty was exaggerated.[80] The case made

---

see also Black et al., *supra* note 68, at 1067 ("The settlement was for $23.5 million, which exceeded Trans Union's $10 million in D&O coverage. The public story is that the acquirer, controlled by the Pritzker family, voluntarily paid the damage award against the directors, and the Pritzkers asked only that each director make a charitable contribution equal to ten percent of the damages exceeding the D&O coverage ($135,000 per person).").

73. *See* Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The* Disney *Standard and the "New" Good Faith*, 56 AM. U. L. REV. 211, 231 (2006) ("The court's decision shook the foundations of the corporate world."); Fred S. McChesney, *A Bird in the Hand and Liability in the Bush: Why* Van Gorkom *Still Rankles, Probably*, 96 NW. U. L. REV. 631, 631 (2002) ("Considered a legal disaster in 1985, it is judged no less disastrous today.") (footnote omitted).

74. *See, e.g.*, Radin, *supra* note 71, at 707-08.

75. *See* Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437, 1445 (1985) [hereinafter Fischel, *The Business Judgment Rule*]; Manning, *supra* note 72, at 1.

76. The "evidence" was almost entirely anecdotal. *See* Faye A. Silas, *Risky Business: Corporate Directors Bail Out*, 72 A.B.A. J. 24, 24 (June 1986). A study during the period by Korn/Ferry reported that twenty percent of "companies reported that qualified candidates had refused an invitation to serve as directors in 1985." *Id.* Thus, for example, two prominent lawyers in Delaware justified the state's waiver of liability provision in part because of the difficulty companies were having attracting qualified candidates to the board. *See* R. Franklin Balotti & Mark J. Gentile, *Elimination or Limitation of Director Liability for Delaware Corporations*, 12 DEL. J. CORP. L. 5, 18 (1987). Their support? *Id.* at 9 n.18 (citing Laurie Baum & John A. Byrne, *The Job Nobody Wants*, BUS. WK., Sept. 8, 1986, at 56; *Business Struggles to Adopt as Insurance Crises Spreads*, WALL ST. J., Jan. 21, 1986, at 31; WALL ST. J., Aug. 26, 1986, at 32.).

77. Fischel, *The Business Judgment Rule*, *supra* note 75, at 1455 (labeling decision as "one of the worst decisions in the history of corporate law").

78. Smith v. Van Gorkom, 488 A.2d 858, 893, 898 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009).

79. *Id.* at 874 ("The directors (1) did not adequately inform themselves as to Van Gorkom's role in forcing the 'sale' of the Company and in establishing the per share purchase price. . . ."). The sale to Pritzker was engineered by Van Gorkom, the CEO of Transunion. *Id.* at 866-67. Stepping down as CEO and chairman, Van Gorkom wanted to sell the company as a way of cashing

no new law,[81] did not second guess the board, and relied on a relatively objective element of the business judgment rule.[82]

Most importantly, the decision arose in Delaware.[83] There was no reason to believe that a decision perceived as anti-management would somehow become a mainstay of the corporate governance process. Indeed, Delaware courts quickly isolated the decision and limited its impact.[84]

Van Gorkom created consternation in the boardroom but did not significantly contribute to the D&O insurance crisis, which was already well underway.[85]

---

out his large ownership interest. *Id.* at 865-66. Because, however, he was to receive a benefit in the sale that was shared by all stockholders, the Delaware courts categorically excluded consideration under the duty of loyalty. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 722 (Del. 1971).

80. Instead, the decision merely required that the file contain sufficient paper to support the decision, often in the form of a fairness opinion. *See* Andrew Ross Sorkin, *Mergers: Fair Should Be Fair*, N.Y. TIMES, Mar. 20, 2005, at 36.

81. The court repeated that shareholders had the burden of overturning the presumption of the business judgment rule and that the applicable standard was gross negligence. *See* Dennis R. Honabach, Smith v. Van Gorkom*: Managerial Liability and Exculpatory Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 322 (2006) ("In short, despite the hysteria of the moment, directors were no more at risk after *Van Gorkom* than they ever were before."); *see also* Morton Moskin, Trans Union: *A Nailed Board*, 10 DEL. J. CORP. L. 405, 406 (1985) ("The *Trans Union* court did not depart from the established rules.").

82. *See* Mark J. Lowenstein, *A. Fleischer, Jr., G. Hazard, Jr., and M. Klipper, Board Games*, 15 DEL. J. CORP. L. 135, 138 (1990) (book review) ("The lasting practical effect of *Smith* may be, at best, that directors more carefully document the reasons that they proceeded as they did. Corporate counsel are likely to integrate the teachings of *Smith* in their standard advice for corporate board meetings to remove any doubt that the board action was properly approved. One cannot conclude from *Smith* that directors will exercise greater control over senior management or more independence from it. The real question following *Smith* is whether the courts will cut through this formalism when director action is challenged and the board can demonstrate the due deliberation called for by *Smith*.") (footnote omitted).

83. *See* Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 647 (2004) ("Although *Van Gorkom* raises the specter of potentially limitless personal liability for directors, the decision was an aberration in Delaware jurisprudence and has been almost uniformly criticized. No subsequent Delaware decision has premised director liability on a breach of the duty of care.") (footnotes omitted).

84. *See* Rachel A. Fink, *Social Ties in the Boardroom: Changing the Definition of Director Independence to Eliminate "Rubber-Stamping" Boards*, 79 S. CAL. L. REV. 455, 487 (2006) ("Similarly, the Delaware Supreme Court weakened the stringent *Unocal* and *Revlon* duties through subsequent decisions, just as it had done after the first wave of prosharehoIder decisions.") (footnote omitted).

85. *See* Honabach, *supra* note 81, at 324 ("The causes for the increased rates were multifold, but it became a popular, yet misguided, sport to point to the *Van Gorkom* decision as a major contributing cause."). Thus, Romano notes that: "Many factors contributed to the market's turbulence, including the expansion of directors' liability. The most important case in this regard

Indeed, an argument could be made that, if anything, the case encouraged greater diligence by directors in the boardroom and should have reduced liability and the cost of coverage.[86] Nonetheless, it was no coincidence that waiver of liability provisions followed quickly in the aftermath of the decision.

C. Section 102(b)(7)

The consternation caused by *Van Gorkom* threatened Delaware's pro-management position. Not lost on the Delaware bar and legislature, the Council of the Corporation Law Section of the Delaware State Bar Association set to work on a legislative response. That Indiana passed a statute designed to reduce liability no doubt increased the pressure on Delaware to act.[87] Rejecting a number of other approaches,[88] the Council ultimately settled on what was to become Section 102(b)(7).[89] Relying on an "opt-in" approach, the provision

---

was a 1985 Delaware decision, *Smith v. Van Gorkom*." Romano, *The States as a Laboratory*, *supra* note 10, at 220 (footnote omitted). Given the reasons noted above, *see supra* notes 83-84 and accompanying text, and the fact that *Van Gorkom* was decided in 1985, only a year before the "crisis" ended, it is inaccurate to suggest that this decision played a significant role in the "crisis." Romano herself is forced to concede that "*Van Gorkom* was decided after the D & O crisis is thought to have begun, so it is best considered a contributing, rather than causal, factor for the market disruption." Romano, *The States as a Laboratory*, *supra* note 10, at 221 n.25.

86. *See* William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894, 898 (1997) ("[C]ertainty . . . also creates the risk that agents—such as corporate management—might deploy such well-defined rules cleverly (and technically correctly), but with the purpose in mind not to advance long-term interests of investors, but to pursue some different purpose . . . . Thus, at least in that corner of contract law occupied by corporation law, clarity itself may be thought to be a qualified good, not an unqualified good.").

87. James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207, 1209 (1988) ("The first state to respond to the developments of the mid-1980s was Indiana, in April 1986, followed by Delaware in June.").

88. Balotti & Gentile, *supra* note 76, at 9 n.21 ("Among the proposals considered and rejected were amending § 145(b) to permit indemnification of judgments or amounts paid in settlement of derivative suits, amending § 145(g) to permit wholly-owned 'captive' subsidiaries to provide 'insurance' to the parent corporation, providing a statutory 'cap' for personal liability of directors, and providing an automatic statutory exemption from certain types of liability."). Other models were adopted in the early years. Roberta Romano has a thorough discussion of the development of these provisions. *See* Romano, *The States as a Laboratory*, *supra* note 10, at 220-23.

89. Support for the approach could only be found in a turn of the century case in England, upholding a charter provision waiving liability. *See* E. Norman Veasey et al., *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399, 403 (1987) ("The concept of a provision in the certificate of incorporation limiting or eliminating the liability of directors was not without precedent. Some scholars had suggested that the certificate of incorporation of Delaware corporations could be amended to limit or eliminate liability of directors without enabling legislation under existing law by analogy to trust law in an old English Chancery decision that appeared to sanction a corporate charter provision limiting

authorized companies to insert into their articles a provision that essentially allowed for the waiver of monetary damages against the board for violations of the duty of care.[90] In other words, companies could absolve their directors for grossly negligent behavior.[91]

Despite the temporal proximity to *Van Gorkom*, the legislative history of the provision indicated that the impetus was the "crisis" in the D&O insurance market:

> Section 102(b)(7) and the amendments to Section 145 represent a legislative response to recent changes in the market for directors' liability insurance. Such insurance has become a relatively standard condition of employment for directors. Recent changes in that market, including the unavailability of the traditional policies (and, in many cases, the unavailability of any type of policy from the traditional insurance carriers) have threatened the quality and stability of the governance of Delaware corporations because directors have become unwilling, in many instances, to serve without the protection which such insurance provides and, in other instances, may be deterred by the unavailability of insurance from making entrepreneurial decisions. The amendments are intended to allow Delaware corporations to provide substitute protection, in various forms, to their directors and to limit director liability under certain circumstances.[92]

Aware that the "crisis" was economic in nature (reflecting increased costs of insurance), the legislature attempted to link the reform to improved governance. Waiver of liability provisions would ensure a steady supply of qualified directors.[93]

---

liability."). The Chancery case mentioned is *In re Brazilian Rubber Plantations and Estates, Ltd.*, (1911) 1 Ch. 425.

90. DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2006 & Supp. 2009). The provision allowed companies to "eliminate or limit personal liability of . . . directors . . . for violations of a director's fiduciary duty of care." Commentary on Section 102(b)(7), S. 533, 133d Gen. Assembly 2, 65 Del. Laws ch. 289 (1986).

91. Veasey et al., *supra* note 89, at 402 ("In essence, the new legislation permits a corporation, by a provision in its certificate of incorporation, to protect its directors from monetary liability for duty of care violations, i.e., liability for gross negligence.").

92. Balotti & Gentile, *supra* note 76, at 9 (quoting the synopsis accompanying Senate Bill No. 533, proposing the legislative amendments); *see also* Leo Herzel, *Relief For Directors*, FIN. TIMES (London), July 17, 1986, § 1, at 11 ("The immediate cause for the enactment of the new Delaware statute is a sharp change, adverse to directors, in the market for director and officer (D and O) liability insurance.").

93. Herbert S. Wander & Alain G. LeCoque, *Boardroom Jitters: Corporate Control Transactions and Today's Business Judgement Rule*, 42 BUS. LAW. 29, 40 n.57 ("The Delaware legislature has responded to the increased judicial scrutiny of the boardroom (particularly the *Van Gorkom* decision) and to the dramatic reductions in available directors' and officers' liability insurance."); *see also* Duggin & Goldman, *supra* note 73, at 231-32 ("The legislative history of the

The rationale was suspect, solving a problem in the D&O insurance market that either did not exist or could have been more appropriately corrected by the market.[94] First, it presupposed that the insurance "crisis" resulted from an increased risk of liability[95] under the duty of care, an unproven assumption at the time[96] that ultimately proved incorrect.[97] Second, there was every reason to

---

statute is sparse, but it is clear that the legislature's objective was to undo a decision that many believed would discourage qualified people from serving as corporate directors."); James L. Griffith, Jr., *Director Oversight Liability: Twenty-First Century Standards and Legislative Controls on Liability*, 20 DEL. J. CORP. L. 653, 688 (1995) ("Most commentators attribute enactment of section 102(b)(7) to the Delaware Supreme Court's decision in *Smith v. Van Gorkom*. There is no direct evidence in the legislative history to support such a contention. Rather, the General Assembly seemed concerned that director and officer insurance was becoming unavailable and, as a result, the best directors would not serve on the boards of Delaware corporations.") (footnotes omitted).

94. David Rosenberg, *Making Sense of Good Faith in Delaware Corporate Fiduciary Law: A Contractarian Approach*, 29 DEL. J. CORP. L. 491, 497 (2004) ("Delaware did not become the center of American corporate law by ignoring the needs and worries of corporate directors.").

95. The number of law suits against directors apparently doubled between 1974 and 1984. Romano, *Corporate Governance*, *supra* note 63, at 1158; *see also* Griffith, *supra* note 93, at 688 n.210 ("First, the market was probably already in the early stages of an unavailability crisis, as government regulation was on the rise, and government and private lawsuits were around every corner.").

96. Premiums began to escalate even before the Delaware Supreme Court's decision in *Van Gorkom*. *See* Griffith, *supra* note 93, at 688 n.210. Yet oddly, Romano notes that the D&O insurance market had "changed dramatically" by 1984, with "premiums skyrocketing at the same time that coverage was shrinking and deductible increasing." Romano, *The States as a Laboratory*, *supra* note 10, at 220. She notes that "many factors" contributed to this increase, "including the expansion of directors' liability" and describes *Van Gorkom* as "[t]he most important case in this regard." *See id.* However, *Van Gorkom* was decided in 1985, after the dramatic change, and even Romano acknowledges that the crisis had largely passed by 1986, shortly after the decision was rendered. *See id.* at 221 n.25 ("It should be noted that *Van Gorkom* was decided after the D&O crisis is thought to have begun, so it is best considered a contributing, rather than causal, factor for the market disruption.").

97. During the period, for example, the costs of insurance increased for other types of liability, which suggests that the problem was industry-wide. Romano, *Corporate Governance*, *supra* note 63, at 1161 ("D & O insurers did not respond to the enactment of limited liability statutes by lowering premiums, although the vast majority of corporations that had the opportunity to opt for these new regimes did so."); *see also* Roberta Romano, *What Went Wrong with Directors' and Officers' Liability Insurance?*, 14 DEL. J. CORP. L. 1, 31-32 (1989) [hereinafter Romano, *What Went Wrong*] ("Insurers did not respond to the enactment of these statutes by reducing 1987 policy rates, although many firms acted immediately to amend their charters."). Romano, who clearly favored the provisions, came up with two possible explanations. "First, the statutes in most states do not exempt from liability claims for breach of the duty of loyalty, violation of federal securities laws, and breach of the duty of care by directors who are also officers." Romano, *Corporate Governance*, *supra* note 63, at 1161. In other words, *Van Gorkom* and the duty of care had little

believe that the problem would be short-lived,[98] with the market, in time, establishing a new equilibrium.[99] In fact, by 1987, the "crisis" was largely over.[100]

The purported concern over corporate governance was never established. While some anecdotal "evidence" indicated a growing number of resignations,[101] the evidence was never marshaled to show that this resulted from problems in the D&O insurance market or that adequate replacements were unavailable.[102] Indeed, some of the evidence suggested that directors quit not because of a threat of liability but because, in the aftermath of *Van Gorkom*, they had to work harder.[103] Moreover, even if the pool had declined, companies had a ready mechanism for correcting the imbalance: increasing directors' fees.[104]

The adoption of waiver of liability amounted to an overbroad response to the purported concerns about "uncertainty" in the application of the duty of care. The issues arising out of *Van Gorkom* could have been addressed in a narrower fashion,[105] focusing, for example, on the basis for establishing an informed decision.[106] The provision, however, went beyond the purported problems created

---

impact on the D&O policies. "Second, and perhaps more important, the statutes' effectiveness will depend on how courts interpret them." *Id.*

98. As insurance companies proved better able to assess the risks associated with D&O insurance, premiums would presumably stabilize and additional carriers would enter the market. This is apparently what occurred. *See* Romano, *The States as a Laboratory*, *supra* note 10, at 221 n.25.

99. *See* Baker & Griffith, *supra* note 66, at 507 ("The tightening of underwriting standards accompanies a 'hard market' in which premiums and, after a lag, underwriting profits, rise. Increased underwriting profits, of course, spur competition, whether from new entrants or established companies seeking to increase market share, and competition leads to another 'soft market' of loosening of underwriting standards and declining profits. The process is described as cyclical because each market condition contains the seed to generate the other.") (footnote omitted).

100. *See* Romano, *What Went Wrong*, *supra* note 97, at 2 ("The turbulent conditions in the D&O insurance market persisted until mid-1986, when the rate of cost escalation and capacity reduction declined. While many corporations reported having difficulty in securing D&O insurance coverage in 1986, only a small number failed to resolve the problem.").

101. *Id.* at 1-2; *see also* Kristen A. Linsley, Comment, *Statutory Limitations on Directors' Liability in Delaware: A New Look at Conflicts of Interest and the Business Judgment Rule*, 24 HARV. J. ON LEGIS. 527, 531 (1987) (noting that concern that qualified individuals would be unwilling to serve as directors after *Van Gorkom* led to enactment of Delaware's Section 102(b)(7)).

102. For an excellent discussion of the paucity of data on this issue, see Nowicki, *supra* note 64, at 478-79.

103. *See* Silas, *supra* note 76, at 24.

104. *Id.*

105. The legislature could, for example, have increased the circumstances when directors could rely on the CEO or market price in making informed decisions.

106. For those companies putting in place a waiver of liability provision, actions seeking to impose liability for breach of the duty of care could be summarily dismissed. As the Delaware

by the decision, eliminating liability even in circumstances where no uncertainty existed.[107]

In other words, the Delaware legislature adopted waiver of liability provisions to cure an insurance "crisis" that was short-lived, and likely structural, in order to prevent adverse consequences which were unproven for boards of directors. Rather than fix the perceived concerns with *Van Gorkom* through a narrowly tailored approach, Delaware's legislature opted for an overbroad solution that exonerated directors for breach of the duty of care in all circumstances. In short, it was a provision designed less to solve a real governance problem and more to use the surrounding din as cover to reduce director liability.

Waiver of liability did not, therefore, restore the D&O insurance market. It did, however, restore Delaware's pro-management position, something that had taken a beating in the aftermath of *Van Gorkom*. The "crisis" was little more than a cover for a substantial, pro-management change in fiduciary obligations.[108]

Even as the insurance crisis dissipated, other states passed copycat legislation. By corporate law reform standards, the speed with which other states fell in line was nothing short of remarkable.[109] Within a few years of the new millennium,

---

Supreme Court noted in *Emerald Partners v. Berlin*, 787 A.2d 8 (Del. 2001),

> unless there is a violation of the duty of loyalty or the duty of good faith, a trial on the issue of entire fairness is unnecessary because a Section 102(b)(7) provision will exculpate director defendants from paying monetary damages that are exclusively attributable to a violation of the duty of care.

Id. at 92; *see* Lubben & Darnell, *supra* note 67, at 591 ("We answer the first question by tracing the waning of the duty of care—a rule that now requires little more of a director than a ritualistic consideration of relevant data. Today, after the director engages in this ritual, her decision will not violate the duty. In short, the classic duty of care no longer exists in Delaware."); *see also* Malpiede v. Townson, 780 A.2d 1075, 1096-97 (Del. 2001).

107. Thus, for example, the "best interests of shareholders" is met by any rational purpose. *See, e.g.*, J. Robert Brown, Portnoy v. Cryo-Cell*: Vote Buying, Manipulation of the Voting Process, and the Race to the Bottom—The Last Word*, http://www.theracetothebottom.org/preemption-of-delaware-law/portnoy-v-cryo-cell-vote-buying-manipulation-of-the-voting-p-3.html (Feb. 14, 2008, 06:15 MST).

108. Which at least, in part, explains why so many commentators continue to ascribe the reform to an attempt to overturn *Van Gorkom*. *See* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 DUKE L.J. 1, 14 (2005) ("The passage of 102(b)(7), in other words, was the legislature's affirmation of the principle that the judiciary would stay out of corporate governance, provided that the board did not behave disloyally or, as the statute added, in bad faith.").

109. For at least some, the insurance crisis was the ostensible justification. *See generally* James J. Hanks, Jr., *State Legislative Responses to the Director Liability Crisis*, 20 REV. SEC. & COMMODITIES REG. 23 (Feb. 11, 1987). Eventually, that could no longer be the explanation. *See* Douglas M. Branson, *Recent Changes to the Model Business Corporation Act: Death Knells for Main Street Corporation Law*, 72 NEB. L. REV. 258, 271 (1993) ("Thus, in response to a temporary problem, a liability insurance crunch that had affected most forms of liability insurance, and not

all states had some version of waiver of liability.[110] A modest number of states chose an "opt-out" approach, eliminating monetary damages for breach of the duty of care but allowing companies to reinstate damages through amendments to the articles.[111] The vast majority of states, however, followed the Delaware model and relied on an "opt-in" approach.[112]

What could be the reasons? Not the D&O insurance crisis; that was over.[113] Not efficiency. Instead, the statutes were designed to prevent companies from moving to Delaware.[114] Whatever Delaware's motivation, other states adopted comparable provisions not because of improved governance or efficiency,[115] but because the statutes benefited management and avoided re-incorporation, even though some evidence suggested harm to shareholder values.[116]

D & O coverage alone, most American legislatures let themselves be goaded into adopting a permanent change to bedrock common law.") (footnote omitted).

110. Romano has reported that it took only fourteen years for forty-nine states to adopt some form of liability limitation. *See* Romano, *The States as a Laboratory*, *supra* note 10, at 224.

111. *See id.* at 222-23.

112. *See id.*

113. In time, however, even Delaware stopped using the insurance crisis as the justification. *See* William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 462-63 (2002) ("That statute, which was enacted in direct response to *Van Gorkom*, permits certificates of incorporation to contain a provision that exculpates directors from damages liability for breaches of the duty of care. That statute thus restored most of the liability protections afforded by a consistently applied gross negligence standard."); *see also* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1166 n.18 (Del. 1995) (stating that "[t]he statute was, in fact, a legislative response to [the Supreme Court of Delaware's] liability holding in *Van Gorkom*").

114. Romano, *The States as a Laboratory*, *supra* note 10, at 224 ("Commentaries by practitioners in several states refer to concern that firms would reincorporate if the state did not adopt a limited liability statute similar to the Delaware provision."). Romano also contends that the provisions were adopted because of "the perceived insurance crisis." *Id.* at 221. States that followed on the heels of Delaware could perhaps claim with a straight face that they acted in response to the perceived crisis. However, surely such a claim would be stretching credulity for those acting several years later.

115. Some have tried to argue that these provisions arose not out of self-interest, but efficiency. Roberta Romano notes that the provisions are "uniformly approved by shareholders" and that the evidence "suggests that investors find the Delaware approach attractive." *Id.* at 224. Having the provisions, she surmises, is "consistent" with "attracting higher quality outside directors." *Id.* at 224-25. Interestingly, she has apparently abandoned other rationale used in the past to argue that these provisions are really beneficial. *See* Romano, *Corporate Governance*, *supra* note 63, at 1156 ("But the most popular reform, limited liability statutes, most likely will prove to be beneficial for shareholders, by eliminating a class of lawsuits where insurance payouts defray legal costs rather than compensate shareholders, and any deterrent effect is quite problematic.").

116. *See generally* Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care*

III. THE CORPORATE RESPONSE

The conclusion that Delaware authorized waiver of liability provisions to restore its pro-management reputation does not necessarily preclude a finding of increased efficiency.[117] The Delaware model relied upon an opt-in approach, which theoretically allows owners and managers to bargain for the most efficient arrangements.

In practice, however, this has not been the case.[118] The "opt-in" approach used by the Delaware statute places exclusive authority in the hands of management to institute a waiver of liability provision and to draft the appropriate language. Structured as amendments to the articles, only the board can initiate the change.[119] The monopoly over initiation effectively bars shareholders from opting back into the default regime.[120] Management, therefore, can pick the most

---

Standard in Corporate Governance, 75 IOWA L. REV. 1 (1989) (discussing how legal rules and economic forces interact to facilitate corporate prosperity). *See also* Honabach, *supra* note 81, at 312 ("Some also believe that both the enactment of section 102(b)(7) and the individual corporate decisions to add an exculpatory provision to corporate charters resulted in a loss of shareholder value."). As for attracting outside directors, there is simply no evidence that companies have trouble attracting these types of directors, with or without waiver of liability provisions. With expanded indemnification, D&O insurance (no more crisis there), and director fees that can run over a half a million dollars, it cannot be argued with a straight face that, absent waiver of liability, a large public company would have trouble obtaining enough qualified outside directors.

117. The repeal on size limits just before the turn of the nineteenth century may have arisen from self interest but resulted in improved efficiencies.

118. *See* McChesney, *supra* note 73, at 648-49 ("As shareholders confronted the implications of *Van Gorkom*, a second development was predictable. In the contractarian model, faced with a decision that swept away existing contracts between shareholders and their management, competing state legislatures would seek to restore the value-maximizing status quo ante. Delaware's imposition of an inefficient law (one whose costs exceeded its benefits) created a profit opportunity for politicians in other states to install rules guaranteeing that *Van Gorkom* could not happen in their jurisdictions. That competition would force Delaware to mitigate the effects of the inefficient rule it created.").

119. *But see* North Dakota Publicly Traded Corporations Act, N.D. CENT. CODE ANN. §§ 10-35-01 to -33 (Supp. 2007) (providing shareholders of public companies with the right to initiate amendments to the articles of incorporation).

120. *See* Bebchuk & Hamdani, *Optimal Defaults*, *supra* note 52, at 502 ("On most important issues, corporate law requires companies wishing to opt out of a default arrangement to do so by amending their charters. Charter amendments, in turn, require approval by shareholders representing a majority of the outstanding shares. Shareholders can only act, however, on the basis of proposals put forward by the board of directors. Shareholders can never initiate charter amendments, and the board thus enjoys a veto power over such amendments.") (footnote omitted). This is critical. Even if management is eventually replaced, the new set of directors would presumably want to retain the waiver of liability provision and would, therefore, be unlikely to initiate an opt-out process. It should be noted that Pennsylvania allows the provision to be included in the bylaws which may permit shareholder initiation. *See* 15 PA. CONS. STAT. ANN. § 513 (West

propitious moment to make a proposal, and, once in place, shareholders cannot initiate repeal.[121] Finally, as the proponent, it is management that drafts the language in the waiver provisions.[122]

The adoption process, predictably, contains no element of bargaining or private ordering. Instead, it is a management-dominated process.[123] Given the benefits to management resulting from adoption, its control over the process, and the inability of shareholders to initiate repeal, it is difficult to see the opportunities for bargaining and private ordering.[124] Instead, one could reasonably predict that over time all companies would put these provisions in place[125] and all provisions would waive liability to the fullest extent permitted by law.[126]

With these predictions in mind, let us turn to the empirical evidence. Many authors have already noted the popularity of waiver of liability provisions.[127] No

---

1995).

121. Bebchuk & Hamdani, *Optimal Defaults*, *supra* note 52, at 503 ("For our purposes, what is critical is only that there are impediments to reversing a default arrangement favored by managers and that such an arrangement thus might not be reversed even if the arrangement is value decreasing and the transaction costs of changing it are small. The problem is that default arrangements favoring managers are likely to 'stick.'").

122. *See* Rutheford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 585 (1996) ("Relatedly, one should not forget that managers control the process by which such opting out terms are constructed, implemented, and priced. Managers or their agents typically bear responsibility for drafting the opt-out provisions, and typically mangers establish the process through which the corporation or the corporate constituencies 'consent' to the opt-out provisions.").

123. Others have noted the problem with suggesting that a corporation is a nexus of contracts negotiated by the relevant parties. *See* Brudney, *supra* note 14, at 1412 ("It stretches the concept 'contract' beyond recognition to use it to describe either the process of bargaining or the arrangements between investors of publicly held corporations and either theoretical owners first going public or corporate management. Scattered stockholders cannot, and do not, negotiate with owners who go public (or with management—either executives or directors) over hiring managers, over the terms of their employment, or over their retention.").

124. *See* Archer-Daniels-Midland Co., Definitive Proxy Solicitation Material (Form DEF 14A) (Sept. 25, 1996) ("RESOLVED: The shareholders of Archer Daniels Midland Company urge the Board of Directors to take such action as is necessary to provide for directors personal monetary liability for acts or omissions that constitute a breach of a director's fiduciary duty of care resulting from gross negligence.").

125. *See* McChesney, *supra* note 73, at 649 ("Shareholders have overwhelmingly responded to the opportunity by adopting the director-protecting charter amendments permitted by these new statutes. So has been restored the status quo ante in corporate law: virtually a zero-chance of liability for directors in duty-of-care cases.").

126. Thus, for example, management with surly shareholders ready to oppose the provisions might wait until reincorporation when shareholders will be denied a straight up or down vote on the provision.

127. As commentators have noted: "According to one treatise, in the year after enactment of

one, however, has studied the phenomenon systematically.[128]

We have chosen as the initial universe for examination the Fortune 100 in the United States.[129] Of that group, ninety-nine are incorporated under state law. Freddie Mac, a federally incorporated entity, is the only exception.[130] Of the remainder, sixty-five are incorporated in Delaware, five in New York,[131] four in New Jersey,[132] Minnesota,[133] and Pennsylvania,[134] three in Ohio,[135] Washington,[136] and North Carolina,[137] two in Illinois,[138] and Massachusetts,[139] and one in

---

the section, 4,206 charter amendments or restated certificates of incorporation containing director liability provisions were filed in Delaware. The 13,697 new certificates of incorporation were filed with these provisions." Lubben & Darnell, *supra* note 67, at 600 n.74 (citing 1-6 Delaware Corp. L. & Prac. § 6.02 n.58 (2004)); *see also* Lawrence A. Hamermesh, *Why I Do Not Teach* Von Gorkom, 34 GA. L. REV. 477, 490 (2000) (finding that "[c]harter provision enabling statutes like Delaware's section 102(b)(7), moreover, have been almost universally implemented by corporations to which such laws apply").

128. *But see* Bradley & Schipani, *supra* note 116, at 62 (stating that of a sample of 593 Delaware firms "it appears that 94% (559/593) of Delaware firms amended their articles of incorporation in accordance with section 102(b)(7)").

129. *Fortune 500: Our Annual Ranking of America's Largest Corporations*, FORTUNE, Apr. 30, 2007, *available at* http://money.cnn.com/magazines/fortune/fortune500/2007/full_list/. For a list of the companies and the status of their waiver of liability provisions, see Appendix, *supra* note 12.

130. As of 2007, Freddie Mac was number 50 in the Fortune 100. The articles of incorporation for Freddie Mac are in the statute. *See generally* Federal Home Loan Mortgage Corporation Act, http://www.freddiemac.com/governance/pdf/charter.pdf (last visited Mar. 9, 2009).

131. N.Y. BUS CORP. LAW § 402 (McKinney 2003).

132. N.J. STAT. ANN. § 14A:2-7 (West 2003).

133. MINN. STAT. ANN. § 302A.251 (West 2004 & Supp. 2008).

134. 15 PA. CONS. STAT. ANN. § 513 (West 1995). Pennsylvania allows the provision to be included in the bylaws.

135. *See* OHIO REV. CODE ANN. § 1701.59(D) (West 1994 & Supp. 2008) (requiring clear and convincing proof "that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation."). The provision does allow a corporation to opt out. *Id.* ("This division does not apply if, and only to the extent that, at the time of a director's act or omission that is the subject of complaint, the articles or the regulations of the corporation state by specific reference to this division that the provisions of this division do not apply to the corporation.").

136. WASH. REV. CODE ANN. § 23B.08.320 (West 1994).

137. N.C. GEN. STAT. ANN. § 55-2-02 (West 2000 & Supp. 2008).

138. 805 ILL. COMP. STAT. ANN. 5/2.10 (West 2004).

139. MASS. GEN. LAWS ANN. ch. 156B, § 13 (West 2005).

Virginia,[140] Maryland,[141] California,[142] and Wisconsin.[143]

Some of these states do not require charter provisions to "opt-in" to the liability waiver. In such states, the corporate code raises the level of culpability necessary for the imposition of damages, with companies allowed to "opt-out." This is true in Ohio and Wisconsin.[144] Virginia imposes a cap but also allows elimination of liability in the articles.[145] The rest (other than Freddie Mac) mimic the Delaware model, with some variations in language.[146]

Among the non-federally incorporated, non-mutual companies,[147] only one, Pepsi Co., did not have a waiver of liability provision.[148] Pepsi was incorporated in Delaware in 1919 and re-incorporated in North Carolina in 1986.[149] The bylaws do provide for indemnification rights "to the full extent permitted by law."[150]

Our study of the articles of these companies shows that all waive liability to the maximum extent permitted by law. Several companies[151] have a bare bones version of the clause containing the following language: "A director of the Corporation shall have no personal liability to the Corporation or its stockholders for monetary damages for breach of his fiduciary duty as a director to the full extent permitted by the Delaware General Corporation Law as it may be amended from time to time."[152] The others generally repeat the language in the statute, providing that directors shall not be liable for monetary damages with some listed exceptions. Some specifically reference recklessness, while others prohibit

---

140. VA. CODE ANN. § 13.1-870.1 (2006 & Supp. 2008)

141. MD. CODE ANN., CORPS. & ASS'NS § 2-405.2 (West 2002).

142. CAL. CORP. CODE § 204 (West 1990).

143. WIS. STAT. ANN. § 180.0828 (West 2002 & Supp. 2008). Like Ohio, Wisconsin permits a company to opt out of this provision.

144. *See* OHIO REV. CODE ANN. § 1701.59(D) (West 1994 & Supp. 2008); WIS. STAT. ANN. § 180.0828 (West 2002 & Supp. 2008).

145. *See* VA. CODE ANN. § 13.1-870.1 (2006 & Supp. 2008).

146. We have assembled the statutory provisions governing waiver of liability from all fifty states. *See* Appendix, *supra* note 12.

147. Four of the companies in the top 100 are mutual companies: Liberty Mutual Insurance Group, State Farm, Mass Mutual, and New York Life. At least one, however, has a waiver of liability provision in the bylaws. *See* Appendix, *supra* note 12.

148. Pepsico, Amended and Restated Articles of Incorporation, http://www.pepsico.com/Investors/Corporate-Governance/Amended-and-Restated-Articles-of-Incorporation.aspx (last visited Mar. 9, 2009).

149. *See* Pepsico, Our History, 1986, http://www.pepsico.com/Company/Our-History.aspx#1986.page_3 (last visited Mar. 9, 2009).

150. Pepsico, By-Laws, Article III, § 3.7, http://www.pepsico.com/Investors/ Corporate-Governance/By-Laws.aspx (last visited Mar. 9, 2009).

151. These include Bank of America, Dow, Cisco, Exxon-Mobil, Boeing, Goldman Sachs, Hewlett-Packard, Home Depot, JP Morgan Chase, Newscorp, Sears, Time Warner, and Disney.

152. Countrywide Financial Corp., Quarterly Report (Form 10-Q), at 4 (May 7, 2004).

repeal.[153] With respect to liability for directors, none of the Fortune 100 purport to waive liability in some reduced fashion.[154]

IV. ANALYSIS

What explains this curious uniformity? The data shows that one categorical rule has been replaced with another. While the old rule allowed for damages in the case of a breach of the duty of care, the adoption of an "opt-in" approach to monetary damages simply resulted in everyone opting in. The results show none of the diversity that private ordering predicted.[155]

---

153. For example, Comcast's clause states:

> No person who is or was a Director shall be personally liable, as such, for monetary damages (other than under criminal statutes and under federal, state and local laws imposing liability on directors for the payment of taxes) unless the person's conduct constitutes self-dealing, willful misconduct or recklessness. No amendment or repeal of this Article ELEVENTH. . . .

Comcast, Restated Articles of Incorporation of Comcast Corporation, http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-govArticles (last visited Mar. 9, 2009).

154. In fact Dell's articles of incorporation contain indemnity provisions in addition to waiving liability:

> [The] corporation shall, to the fullest extent permitted by law, indemnify any and all officers and directors of the corporation, and may, to the fullest extent permitted by law or to such lesser extent as is determined in the discretion of the Board of Directors, indemnify any and all other persons whom it shall have power to indemnify, from and against all expenses, liabilities or other matters arising out of their status as such or their acts, omissions or services rendered in such capacities. The corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability.

Dell Inc., *supra* note 61.

155. The data is in contrast with evidence from a study of the charter provisions of companies listed on the Sydney Stock Exchange prior to the enactment of mandatory rules in 1936 conducted by Professor Whincop. *See* Michael J. Whincop, *An Empirical Analysis of the Standardisation of Corporate Charter Terms: Opting Out of the Duty of Care*, 23 INT'L REV. L. & ECON. 285, 285 (2003). He examined 150 charters and found that "[m]ost companies opt for a limited indemnity which does not extend to damages for negligence and adds little to the director's 'default' indemnity rights." *Id.* at 291. The evidence is markedly different from our results and shows that, given the variance, it might be reflective of some bargaining:

> Liability releases are often qualified, but in standardised ways. The principal qualifications refer to "wilful default" or "dishonesty," 43.3% of the charters are qualified by reference to wilful default; 39.3% refer to "dishonesty"; 6% refer to both in the alternative. Only three liability releases were unqualified and none of these

The data shows that companies do not opt-in in the waiver of liability context.[156] This is because of the difficulties imposed on shareholders who might want to engage in some type of negotiations. Thus, realities on the ground make change difficult despite the presence of activist shareholders. Many of these difficulties are systemic.

First, only management has the authority to propose an amendment to the articles of incorporation. Directors can pick the most propitious time to propose a matter to shareholders. The authority goes much further, however, than the power to propose. To the extent management perceives any prospect of losing a vote, it has a variety of tactics that it can deploy to affect the outcome. One example is *Mercier v. Inter-Tel (Del.), Inc.*,[157] where a special committee of the board sought approval of a merger.[158] When, shortly before the meeting, it became clear the proposal would fail, the committee authorized an adjournment.[159] This occurred despite overwhelming opposition to adjournment of the meeting from shareholders.

Second, waiver of liability provisions can be implemented without the benefit of a direct shareholder vote. The provisions may be in the articles when the company goes public.[160] In other cases, they may be inserted into the articles when the company re-incorporates, leaving shareholders with approving the entire transaction, not each individual provision in the articles. Waiver of liability provisions may also be approved in companies with controlling shareholders, making the opinions of the minority shareholders irrelevant.

Third, even when submitted for approval, shareholders confront the usual bevy of collective action problems.[161] They lack information, often a

---

included the broadest form of release.

Id. at 292. The study did find, however, that "a minority of companies opt for a more expansive indemnity, wide enough to include liability for negligence, . . . [except] that the indemnity is not available where the liability arises from the director's 'wilful default.'" *Id.* at 291-92. Unlike the U.S. evidence, Professor Whincop finds that the Australian evidence shows that "terms contracting around the standard of care do not appear to be systematically unfair to stockholders. On the contrary, they are specifically directed to the areas where the imposition of liability seems least efficient (such as liability for business judgments and the defaults of other agents)." *Id.* at 307.

156. *See* data in Appendix, *supra* note 12 (showing uniformity).

157. 929 A.2d 786 (Del. Ch. 2007).

158. *Id.* at 798-99, 802-03.

159. *Id.* at 798-99.

160. Bebchuk & Hamdani, *Optimal Defaults*, *supra* note 52, at 499 ("At the IPO stage, the provisions of the charter are chosen by the party, or parties, (the 'founder') that takes the company public.").

161. Bebchuk, *The Debate on Contractual Freedom*, *supra* note 1, at 1401 ("Although an amendment requires majority approval by the shareholders, voting shareholders do not have sufficient incentive to become informed. And although the amendment must be proposed by the board, the directors' decision might be shaped not only by the desire to maximize corporate value but also by the different interests of officers and dominant shareholders.").

consequence of rational apathy.[162] To oppose management they would need to lobby other shareholders, which is both expensive and difficult due to the proxy rules.[163]

Fourth, there are a number of reasons why shareholders are less likely to oppose waiver of liability provisions. One is the NIMBY phenomenon.[164] Another is path dependence.[165] Yet another is the "me-too" phenomenon, which occurs when one board has a waiver of liability provision to fall back on so every other board clamors for the same. With the provisions universally in place, shareholders would have to accept the consequences of denying the waiver to their management while all other large companies, including competitors, have the waiver in place.

Fifth, shareholders typically want to maintain positive relations with management, preferring to "vote with their feet" when dissatisfied. Thus, they will not oppose management on every proposal, even if they have reservations. In other words, opposition comes with costs attached. Given the insignificance of the duty of care under Delaware law, these costs likely outweigh the benefits that could result from opposition.[166]

Directors might be made nervous by a provision that differs from those of

---

162. Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1574-75 (1989) ("A diffuse group of public shareholders must evaluate this claim against the possibility that the amendment is merely 'wealth-neutral,' because all or almost all of the gain inures to the insiders, or 'wealth-reducing,' because it will transfer cash flow or control from public shareholders to insiders. In these circumstances, shareholder voting as a means of evaluating and consenting to a proposed charter amendment is fraught with severe problems, in particular, collective action problems in acquiring and disseminating information among shareholders, and strategic behavior by insiders that amounts to economic coercion. Thus insiders can exploit their advantages to obtain approval even for wealth-reducing amendments.") (footnote omitted).

163. Most of the provisions were adopted back in the 1980s and early 1990s, at a time when investor activism was not as developed.

164. NIMBY or "Not In My Back Yard" occurs when directors oppose attempts to remove waiver of liability provisions claiming that even if the idea is a good one, it is a reform that is not needed in their company.

165. *See* Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 WASH. U. L.Q. 347, 349 (1996). Kahan and Klausner suggest that

> corporate contract terms can frequently offer "increasing returns" as more firms employ the same contract term. Value arises from the common use of a contract term .... [A]s the use of a term increases, it becomes significantly more attractive (at least up to a critical point), and its attraction becomes self-perpetuating.

Id. at 348 (footnote omitted). This results in standardization which is "a form of path dependence." *Id.*

166. Shareholder opposition surfaces mostly in the context of matters that affect economic interests. Shareholders will, therefore, be more likely to support changes that address issues of entrenchment and mismanagement. Shareholder proposals that most often pass over the opposition of directors typically address anti-takeover devices or majority vote systems.

other companies. In such cases, our evidence might explain the persistence of "suboptimal uniformity."[167] The suboptimal rule waiving liability to the fullest extent allowed by the law has become uniform because learning or network externalities are significant, especially because waiver of liability provisions are drafted and proposed at the insistence of management. Given the agency cost, lawyers on the management payroll are unlikely to draft provisions that are against the interests of management, even if such provisions are in the management interests of shareholders.

CONCLUSION

The nexus-of-contracts approach is a worthy theoretical framework for the examination of issues relating to corporate governance. This is particularly true in emphasizing the importance of private ordering in the regulatory process. The usefulness, however, breaks down when the approach is used to explain the relationship between shareholders and management. There is little evidence in practice that the relationship between shareholders and managers can be accurately characterized as a process of private ordering. Instead, when the law defers to private ordering, the result is that management is allowed to impose on shareholders a categorical rule that embodies its self-interest. In the context of waiver of liability provisions, this approach has resulted in one categorical rule being replaced by another—precisely the opposite of what contractarians desire.

Thus, it would seem that the contractarian approach does not offer an adequate explanation for the situation with regard to waiver of liability provisions. Based on our evidence, the managerial model might offer better predictive power. Management would always want the reduced liability. Given learning and network effects, over time, such provisions would become universal. Management would also want protection to the fullest extent permitted. This would yield provisions consistent with the evidence that we have presented.

The evidence is consistent with a race to the bottom. The waiver of liability provisions were not designed to solve a corporate governance problem, but were intended to benefit management. Because management controls the re-incorporation process, they could move the company to Delaware to take advantage of reduced liability. Other states quickly mimicked Delaware's approach, not because it promoted good governance or efficient behavior, but because it prevented corporate flight to Delaware.

To have anything approaching an effective system of bargaining, the shareholder voting process must be meaningful.[168] Management must know that shareholders have the ability to veto or overturn an opt-in or opt-out decision. Therefore, there must be substantial reform of the shareholder voting process.

---

167. *See* Kahan & Klausner, *supra* note 165, at 352-53 (noting "it is possible for a suboptimal term to become standardized from the start and remain so. [Or], a term may become standardized and widely used even if it would be optimal for some firms to adopt an alternative term").

168. Thus, we disagree with Professor Bainbridge, *see supra* note 59, that the nexus of contracts theory compels an approach to corporate governance that requires a weakening of shareholder authority.

These reforms need to do several things. First, shareholders need authority equal to that of management to initiate an opt-in or opt-out process or to change a prior decision. To do this, all opt-in or opt-out provisions either need to be in the bylaws (with shareholders receiving explicit authority to initiate, change, or repeal the bylaws) or, in the articles of incorporation with the authority to initiate an amendment to the articles.[169]

Second, shareholders need to be given far broader authority to propose changes to the arrangements that constitute the nexus of contracts in any particular company. There are substantial areas of governance that are off-limits to shareholders. These typically arise in the context of proposals that could affect the management of the company. The argument that shareholders should not be allowed to micromanage the diurnal functioning of the company has been raised as the bogey to limit shareholder empowerment in areas that, at best, involve de minimis interference in the actual management of the company. Shareholders might condition support for a management inspired opt-in or opt-out proposal on management support for additional shareholder authority, such as an advisory vote on executive compensation.

Third, steps need to be taken to solve some of the collective action problems that impede the shareholder approval process. These issues generally relate to organization and cost. Cost issues arise most clearly in the need to solicit proxies, an expensive and time consuming process. Liberal access to the company's proxy statement for shareholder proposals would be one way to reduce costs associated with collective action.

---

169. At least one state in narrow circumstances has given this authority to shareholders. *See* North Dakota Publicly Traded Corporations Act, N.D. CENT. CODE ANN. §§ 10-35-01 to -33 (Supp. 2007).

Indiana Law Review

Volume 42 2009 Number 2

PROGRAM ON LAW AND STATE GOVERNMENT FELLOWSHIP SYMPOSIUM

Education Reform and State Government: The Role of Tests, Expectations, Funding, and Failure

WHAT DO WE EXPECT?: AN INTRODUCTION TO THE LAW, MONEY, AND RESULTS OF STATE EDUCATIONAL SYSTEMS

CYNTHIA A. BAKER*

Since its inception, the Program on Law and State Government has been dedicated to fostering the study and research of critical legal issues facing state governments. It continues to be an honor for me, as the founding Director of the Program, to be the custodian of this Fellowship experience at this school. This year's event, *Education Reform and State Government: The Role of Tests, Expectations, Funding, and Failure*, culminates the ideas, research, and work of the 2008 Program on Law and State Government Fellows, Ms. Jonelle Redelman[1] and Mr. Anderson Sanders.[2] With this Introduction to the articles by Professor Michael Heise, *Courting Trouble: Litigation, High-Stakes Testing, and Education Policy*,[3] emanating from the symposium and that by Joseph O. Oluwole and Preston C. Green, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*,[4] I share some of my introductory remarks from the symposium conducting a brief exploration of three aspects of our public education system which contribute to its failures and its successes: law, money, and results. Then, this Introduction provides an overview of the symposium: a day filled with questions about what we get, what we expect, and what we test

* Clinical Associate Professor Law and Director, Program on Law and State Government, Indiana University School of Law—Indianapolis. B.A., *with distinction*, 1998, Valparaiso University; J.D., *magna cum laude*, 1991, Valparaiso University School of Law.

1. Program on Law and State Government Fellow, 2008. J.D. Candidate, 2009, Indiana University School of Law—Indianapolis; B.A., Indiana University/Purdue University—Indianapolis, 2002.

2. Program on Law and State Government Fellow, 2008. J.D. Candidate, 2009, Indiana University School of Law—Indianapolis; B.A., Morehouse College, Atlanta, 2006.

3. Michael Heise, *Courting Trouble: Litigation, High-Stakes Testing, and Education Policy*, 42 IND. L. REV. 327 (2009).

4. Joseph O. Oluwole & Preston C. Green, III, *State Takeovers of School Districts: Race and the Equal Protection Clause*, 42 IND. L. REV. 343 (2009).

from our political and fiscal investments in public education—both in our schools and in our correctional facilities. The Introduction closes with a few words of thanks to all of those who contributed to the symposium's success.

I. LAW

Unlike the Federal Constitution, every state constitution includes an education clause which speaks to the duty of the State to provide some sort of education for its citizens.[5] More than three decades ago, the U.S. Supreme Court stressed that the Federal Constitution makes no mention of education as the Court declined to recognize a fundamental right to education.[6] Since then, state governments and their respective local governments, from counties to cities to special school districts have turned to state constitutional clauses, state legislative funding formulae, and, more often than not, state courts, to calibrate how we fund our schools, what is fair, and, more recently, what constitutes an adequate education.[7]

Scholars suggest that "whether measured in terms of local budgets, the local government workforce, the impact on local communities or the broader implications for the economy and society, public elementary and secondary

---

5. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. 8, § 1; IOWA CONST. art. 9, 2d, § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 2; OHIO CONST. art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; *see also* Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1291-98 (2009) (listing the state constitutional provisions dealing with education and analyzing the civic dimensions of such provisions).

6. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit [or implicit] protection under our Federal Constitution.").

7. *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996); Nagy v. Evansville-Vanderburgh Sch. Corp., 870 N.E.2d 12 (Ind. 2007); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Abbott v. Burke, 643 A.2d 575 (N.J. 1994); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Tenn. Small Sch. Sys. v. McWherter, 894 S.W.2d 734 (Tenn. 1995).

education is the most important service provided by local governments."[8] Due in large part to the tradition of public school funding levels being directly related to local property values,[9] state governments and state-wide taxpayer dollars enter into the education funding formulae primarily as a way to equalize the funding, and hopefully, the educational opportunities for the children of those states. As a result, state governments are tugged in at least two directions with respect to public education. The first tug springs from deference to the most local of local governments, the school districts. As the Supreme Court noted in *San Antonio Independent School District v. Rodriguez*,[10] "The persistence of attachment to government at the lower level where education is concerned reflects the depth of commitment of its supporters."[11] The second tug derives from states' respective obligations to provide the requisite amount, whatever that may be, of education to their children as accorded by their own constitutions.[12]

What should the proper state/local balance be? A stark example of how the balance of state/local contributions to public education can make dramatically unfair what would, in a vacuum, be seen as a fair way to fund schools is set forth in a string of cases out of Texas.[13] In *Edgewood Independent School v. Kirby*,[14] the Texas Supreme Court noted the "glaring disparities" stating that the "wealthiest district has over $14,000,000 of property wealth per student, while the poorest has approximately $20,000" of property wealth per student—a 700:1 ratio.[15] More than forty state supreme courts in the last four decades, have been called upon to address disparities in funding formula with more state tax dollars,

---

8. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 486 (7th ed. 2009).

9. *See id.*

10. 411 U.S. 1 (1973).

11. *Id.* at 49.

12. *See, e.g.*, BRIFFAULT & REYNOLDS, *supra* note 8, at 487; *see also* sources cited *supra* note 5.

13. Neeley v. W. Orange Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 794-98 (Tex. 2005) (holding Texas's school funding formula (upheld in *Edgewood IV*) unconstitutional under state constitution's prohibition on state-level property tax); Edgewood Indep. Sch. Dist. v. Meno (*Edgewood IV*), 917 S.W.2d 717,750 (Tex. 1995) (upholding Texas legislature's school funding formula. The funding structure included a recapture provision, requiring certain wealthy school districts to consolidate with another district, detach portions of district to another (presumably less wealthy) district, contribute additional funds to the state, to pay for education of non-resident students, or to consolidate its tax base with another district); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (*Edgewood III*), 826 S.W.2d 489, 513-14 (Tex. 1992) (holding a subsequent legislative attempt to revamp school funding and school district structure to address funding inequities unconstitutional); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood II*), 804 S.W.2d 491, 494-99 (Tex. 1991) (holding that the Texas legislature's response to the 1989 case (eliminating much of the inter-district inequality by raising taxes) was unconstitutional); Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391 (Tex. 1989).

14. 777 S.W.2d 391 (Tex. 1989).

15. *Id.* at 392.

different funding formulae, or both.[16] In over half of those cases, the plaintiffs from poorer school districts won at the state supreme court level with the court ordering some influx of state-wide, state funded education to offset the disparities arising from the purely local property tax funding mechanisms.[17]

The effect of these victories, although Pyrrhic in some respects due to the lack of power for the state supreme courts to actually change the funding formulae set out in legislation, has been to modestly reduce the local share, and thereby, increase the state share of school funding.[18] Today, the proportional breakdown of education spending among states and their respective local governments varies widely. For example, New Mexico has funded as much as 88% of the cost of elementary/secondary education, with its specific school districts contributing 12%.[19] In contrast, Nevada currently funds its elementary and secondary education costs at 38%, the lowest current statewide level, with 67% of its educational funding dollars coming from local school district property taxes.[20]

A second result is that state courts have repeatedly had to analyze state constitutional equal protection and education clauses, decide the role of the states in addressing interlocal inequalities among school districts, and assess the relationship between the state government and its local governments in financing public education.[21] State governments' increasing involvement in how we educate our children certainly helped set the stage for the federal government to become more involved than it ever has been, most recently and clearly, through the federal No Child Left Behind Act of 2002 (NCLB).[22] So now, state governments, the quintessential middlemen, find themselves between local school districts who need state government help, those who do not want any interference, and federal government mandates to achieve yearly annual improvement on standardized tests.

---

16. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 417-18 (6th ed. 2004) (noting that funding formulae have been challenged in forty-plus states); *see, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); W. Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558 (Tex. 2003); *Edgewood I*, 777 S.W.2d 391.

17. BRIFFAULT & REYNOLDS, *supra* note 16, at 417.

18. *Compare* Wayne Riddle & Lione White, *Expenditures in Public School Districts: Estimates of Disparities and Analysis of Their Causes*, *in* U.S. DEP'T OF EDUC., OFFICE OF EDUC. RESEARCH AND IMPROVEMENT, NAT'L CTR. FOR EDUC. STATISTICS, DEVELOPMENTS IN SCHOOL FINANCE, 1996, at 23-37, NCES 97-535, *with* U.S. DEP'T OF EDUC., INST. OF EDUC. SCIS., NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 2007, fig. 9 (2007), *available at* http://nces.ed.gov/programs/digest/d07/figures/fig-09.asp?referrer=figures.

19. *See* INST. OF EDUC. SCIS., *supra* note 18, at ch. 2.

20. *Id.*

21. *See* BRIFFAULT & REYNOLDS, *supra* note 8, at 487.

22. 20 U.S.C. §§ 6301-7941 (2006).

II. MONEY

Sir Claus Adolf Moser is credited with saying, "Education costs money, but then so does ignorance."[23] But what amount of money might Sir Moser be talking about with respect to the costs of our efforts? What does it or what should it cost to provide an education to a child?

According to 2006 data, state and local governments together spent between $5000 (Arizona and Utah) for one year of elementary/primary education and almost $13,000 (New York and Connecticut) for one year. For that same academic year, the District of Columbia spent over $15,000 per student, while Indiana spent almost $9000 per student, with the national average at about $8500.[24] According to 2002 census data, the national total of state and local government spending toward elementary and secondary education in that one year was over $411 billion.[25] And how do we know what we are getting for that investment? One measuring stick includes results of standardized test scores developed from tests aimed toward measuring how much kids know. Ranging in scope, purpose, and complexity, these tests are as diverse as the challenges facing education in the first place.[26]

States strapped for money are contemplating scaling down or even abandoning challenging, custom made state tests which combine essay questions and problems that require students to explain their answers[27] in favor of cheaper multiple choice tests.[28] Even with the scaled back cheaper tests on the rise, the U.S. General Accounting Office estimated that the cost of six years of developing, scoring, and reporting the tests would cost about $6 billion.[29]

---

23. Sir Claus Moser, DAILY TEL., Aug. 21, 1990, n.p. Moser is an academic statistician and civil servant who was born in Berlin, lived most of his life in England, and has served as the chancellor of both Keele University and Israel's Open University. In 1999, Moser authored a far-reaching investigation of England's literacy and numeracy. Nadene Ghouri, *Last of the Renaissance Men*, TIMES EDUC. SUPP., Mar. 26, 1999, at 25.

24. MORGAN QUINTO CORP., STATE RANKINGS 2006: A STATISTICAL VIEW OF THE 50 UNITED STATES 138 (Kathleen O'Leary Morgan & Scott Morgan eds., 2006) (citing NAT'L EDUC. ASSOC. RANKINGS & ESTIMATES (2005)). Estimates are for the 2004-05 school year and are based on student membership. *Id.*

25. *Id.* at 135 (citing U.S. BUREAU OF THE CENSUS, GOVERNMENTS DIVISION, STATE AND LOCAL GOVERNMENT FINANCES: 2002 CENSUS (2002), *available at* www.census.gov/govs/www/estimate02.html). This data includes capital outlays. *Id.*

26. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS TITLE 1: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES, GAO-03-389, at 10-11 (May 2003).

27. *See id.* at 11 (noting that "some officials believe that open-ended questions, requiring both short and long student responses, more effectively measure certain skills").

28. *Id.* at 15-17. GAO report estimates that costs of multiple choice tests are less than half of the costs of a combination of multiple choice and open ended questions. *Id.* at 17, Table 5.

29. *Id.* at 20, Table 6. These estimates were made in 2003 and were projected from 2002-2008. *Id.* at 19.

Adding in indirect costs—teacher time devoted to coordinating and giving tests and preparing the students with ongoing "practice" tests—would likely drive costs even higher.

While money can be tracked through budgets and accounting, other aspects of the standardized testing culture are less easily measured. The private testing companies operate with little to no public accountability. One educational researcher noted recently that we have more oversight in "'the food we feed our dogs than in the quality of tests our kids take.'"[30] Even more difficult to measure is the impact of these standardized tests on the educational environments in our schools. Scholars continue to study the pedagogical impacts of the tension between "teaching to the test" and "educating" the child and the effects of test distortion on the classroom and its students.[31] But in exchange for the money, the teaching hours, the thousands upon thousands of little circles filled in correctly or incorrectly, we do get a lot of one thing—test results.

III. RESULTS

The chart included as Appendix A represents a sliver of insight from this deluge of information of how well one set of kids did on one standardized test administered in Indiana in the fall of 2007. The chart shows passage rates for different groups of students, grades 3 through 10, on the Indiana Statewide Testing for Educational Progress (ISTEP). The chart indicates that depending on a group's race or socio-economic status (indicated by whether the student qualifies for the federal free or reduced price lunch program) or educational program (general education or special education) or English language proficiency (limited or proficient), the passage rate differs wildly.[32] The last bar on the chart illustrates the sobering, but not surprising statistic, that if a child is black, requires special education and qualifies for a free lunch, that child falls into a group with a mere 17% passage rate. Is that a failure or a success? How should states respond to those scores, those kids? How should we?

In 2005, 71.5% of the senior high school student class of this country graduated—an almost 30% failure rate. Currently, over 85% of U.S. citizens over the age of twenty-five have high school degrees, thus 15% do not. How far will the latter statistic fall if current trends continue? These statistics are aptly captured in an editorial cartoon by John Darkow appearing in the *Columbia Tribune*; the artist depicts three kids walking along with their jeans around their hips. One kid says to the others, "Can you believe that thirty percent of us will drop out [of high school]?" One responds, "Dude, that's like half!"[33]

---

30. Barbara Miner, *Keeping Public Schools Public: Testing Companies Mine for Gold*, RETHINKING SCH., Winter 2004-05, at 1 (quoting Walt Haney, Professor of Education at Boston College).

31. *See generally* PHYLLIS TAUB GREENLEAF, I'D RATHER BE LEARNING: HOW STANDARDIZED TESTING LEAVES LEARNING BEHIND AND WHAT WE CAN DO (2006).

32. *See* App. A.

33. John Darkow, Editorial Cartoon, COLUM. TRIB., Apr. 2, 2008, n.p., *available at*

All joking aside, the Program on Law and State Government Fellowship Symposium of 2008 examined questions about what the law, the money, and the results mean in terms of America's citizenry, democracy, and future. The first half of the day focused on the effects of high-stakes testing on student success. Jonelle Redelman presented her paper, *Kids Who Fail: State Governments' Response to Failure*. Ms. Redelman's introduction of some of the legal and educational issues surrounding State mandated standardized tests was complemented by contributions from three experts in the field, hailing from a law school, a department of sociology, and a state department of education.

An accomplished lawyer, scholar and teacher, Professor Michael Heise[34] shared his thoughts on litigation impacting states' high-stakes testing mandates. Professor John Robert Warren[35] presented his recent empirical research exploring the meaning and use of high school exit examination results in the labor market. Kevin McDowell[36] related Indiana's experience with high school exit examinations detailing one state's path toward increasing the stakes of its standardized tests.

The symposium's afternoon focused on education and testing in the juvenile justice system beginning with Anderson Sanders' Fellowship presentation entitled, *Educating Incarcerated Kids: Lowering Double Digit Recidivism.* Angel Marks[37] further explored the realities and constraints of measuring educational success in a paper based on her experiences and findings as a public defender and a special education advocate. A panel composed of the Honorable Greg Porter,[38] Laurie Elliott,[39] Susan Lockwood,[40] Joann Helfereich,[41] and Angel Marks rounded out the symposium discussing perspectives on challenges and opportunities states face as they work toward creating a better system for educating incarcerated youth.

---

http://archive.columbiatribune.com/2008/apr/20080402Comm051.asp.

34. Professor of Law, Cornell Law School. Ph.D., Northwestern University, 1990; J.D., University of Chicago, 1987; A.B., Stanford University, 1983. Professor Heise served as Senior Legal Counsel to the Assistant Secretary for Civil Rights in the U.S. Department of Education and later as Deputy Chief of Staff to the U.S. Secretary of Education between 1990 and 1992.

35. Associate Professor and the Director of Undergraduate Studies at the University of Minnesota. Ph.D., University of Wisconsin—Madison, 1998; M.S. in Sociology, University of Wisconsin—Madison, 1993; B.A., Carleton College, Northfield, Minnesota, 1991.

36. General Counsel, Indiana Department of Education.

37. J.D., Indiana University School of Law—Indianapolis, 2003.

38. Member, Indiana House of Representatives, 96th District; B.A., Earlham College, 1978. Representative Porter also graduated from Harvard University's John F. Kennedy School of Government's Executive Program in 2001.

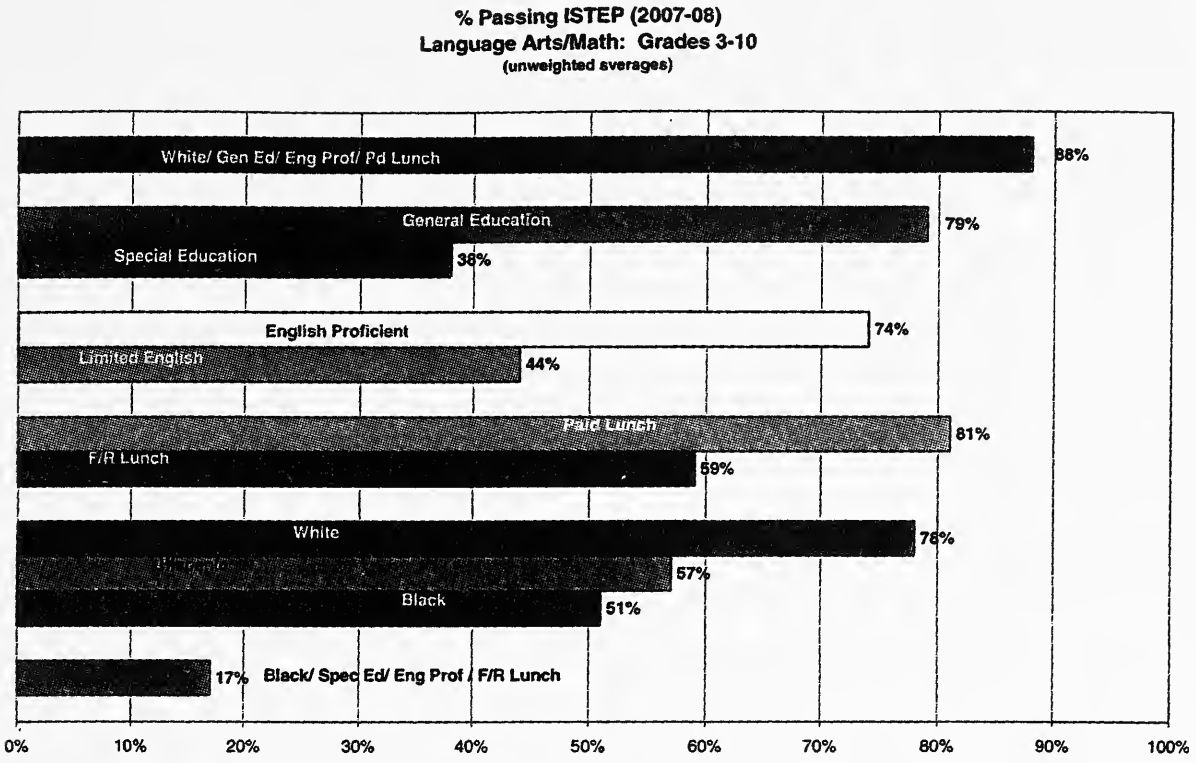
39. Executive Director of the Youth Law T.E.A.M. of Indiana. J.D., Indiana University School of Law—Indianapolis, 1986; B.A., Valparaiso University, 1983.

40. Juvenile Education Coordinator for the Indiana Department of Correction. Ed.D., Oakland City University, 2008.

41. Director, Aftercare for Indiana through Mentoring (AIM). J.D., Indiana University School of Law—Indianapolis, 1999.

The questions, problems, and statistics posed during the symposium highlight some of the challenges in the work ahead as we address the conundrum posed by Sir Moser's assertion that education does cost money, but so does ignorance.[42] The Program on Law and State Government thanks the *Indiana Law Review* for continuing the dialog of the symposium with its inclusion of pieces on that topic in this issue. The Program also thanks all of those who made scholarly contributions to the 2008 Fellowship Symposium, especially Professor Michael Heise, whose work is published in these pages. Finally, the Program acknowledges the efforts of the 2008 Fellows, Jonelle Redelman and Anderson Sanders. My sincere hope is that the ideas emanating from their Fellowship year continue to inform us all as we address how our laws direct our money toward a better educated citizenry.

42. Moser, *supra* note 23.



Race/Ethnicity	**White Hispanic Black Multiracial**
Educational Program	**General education program** **Special education program**
English Language	**Proficient** **Limited**
Family Income	**Paid: not eligible for federal free or reduced price lunch program** **F/R Lunch: eligible for federal free or reduced price lunch program**

Graph, Courtesy of:
Dan Clark, Deputy Executive Director,
Indiana State Teachers Association

COURTING TROUBLE: LITIGATION, HIGH-STAKES TESTING, AND EDUCATION POLICY

MICHAEL HEISE*

INTRODUCTION

Unanticipated consequences invariably flow from court decisions that venture too deeply into legislative and executive policy terrain. Many public policies embody a careful and somewhat delicate calibration of various political interests and compromises. Litigation, by contrast, is adversarial by design and, in general, is limited in scope and reach to the litigating parties' interests. Litigation—and sometimes the mere threat of litigation—frequently influences public policies. The blunt force trauma often inflicted by litigation onto public policies is rarely pretty and often discourages many, especially those impacted by the affected public policies.

Untidy fallout from the interaction between litigation and public policy is common in many policy sectors, especially education. With education policy in particular, this untidiness results partly from the inherent complexity of numerous education policies as well as from the importance of the stakes involved. Some examples of unanticipated consequences incident to legal decisions involving education polices are obvious and easily identified;[1] others are more subtle and nuanced.[2]

Although recent scholarship expresses confidence in the courts' ability to drive education policy and reform,[3] such confidence rests uneasily on optimistic

---

* Professor, Cornell Law School. I am grateful to Dawn M. Chutkow, Matthew Heise, and Michelle Yetter for their input on earlier versions of this Article as well as participants in Indiana University School of Law—Indianapolis Program on Law and State Government Symposium: Education Reform and State Government, "The Role of Tests, Expectations, Funding and Failure." The reference librarians at Cornell Law School also provided excellent research assistance.

1. For example, California's experience in the school finance context is particularly notable. Ironically, successful and path-breaking school finance litigation in California contributed to policies that resulted in a decrease in California's national ranking for per-pupil spending. The precise causal relation between the *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), decision and California's Proposition 13, CAL. CONST. of 1879 art. XIIIA, §§ 1-6, remains in dispute. For a discussion, see, for example, William A. Fischel, *Did John Serrano Vote for Proposition 13? A Reply to Stark and Zasloff's "Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13,"* 51 UCLA L. REV. 887, 890 (2004); Issac Martin, *Does School Finance Litigation Cause Taxpayer Revolt?* Serrano *and Proposition 13*, 40 LAW & SOC'Y REV. 525, 526-28 (2006); Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did* Serrano *Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 807 (2003).

2. The "empiricization of the equal educational opportunity" doctrine is an often-overlooked consequence of the *Brown v. Board of Education* opinion. *See, e.g.*, Michael Heise, *Equal Educational Opportunity by the Numbers: The Warren Court's Empirical Legacy*, 59 WASH. & LEE L. REV. 1309, 1310-11 (2002).

3. *See, e.g.*, BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED

assessments of the courts' comparative ability to minimize consequences set in motion by legal decisions that unsettle education policies. The empirical evidence on the efficacy of court-driven education reforms over the past decades in this regard, however, is mixed.[4]

Even those persuaded by litigation's advantages and contributions to education reforms recognize that the likelihood of legal challenges successfully revolutionizing high-stakes testing policy is increasingly dim.[5] Moreover, even if litigants were poised to deliver positive contributions to high-stakes testing policy in the past, the prospects of legal challenges hoping to disrupt high-stakes tests have diminished over time. Policymakers' recent changes to high-stakes tests make the tests less exposed to legal challenges and, thus, less vulnerable to disruption from litigation and adverse court decisions. Although a complete explanation for why lawsuits challenging high-stakes tests are currently less likely to succeed needs to account for numerous variables and their complicated interactions, this Article focuses on one such variable. Specifically, this Article argues that increased judicial sensitivity to adverse policy consequences from court decisions contributes to the diminishing prospects of lawsuits seeking to upset high-stakes tests.

High-stakes testing policies did not emerge in an education policy vacuum. Part I of this Article includes a brief description of the major high-stakes tests and their policy rationales. Part II surveys recent litigation challenging one distinct genre of high-stakes testing—high school exit exams.[6] Two cases illustrate courts' current posture toward legal challenges of exit exams. Part III reviews evidence of courts' increased sensitivity to the policy consequences attributable to court decisions that interfere with the implementation of exit exams. Part IV concludes and notes the important normative questions raised by judges' concerns with policy consequences flowing from their decisions.

I. HIGH-STAKES TESTS AND POLICY RATIONALES

High-stakes testing's position on the education policy landscape greatly increased in prominence when minimum competency tests (MCTs) emerged in

---

EDUCATION REFORM 14 (2008) (noting the potential for courts to "have a significant and positive influence on the standards-based reform movement"); Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons, and Prospects*, *in* LAW & SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 1, 3 (Jay P. Heubert ed., 1999) (concluding that law-based reform efforts "hold great potential for improving the educational opportunities of disadvantaged children").

4. *See, e.g.*, Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2446-50 (2004) (summarizing the uneven empirical findings about litigation-initiated education reforms that seek to enhance equal educational opportunity).

5. SUPERFINE, *supra* note 3, at 14, 86.

6. *See* GI Forum Image DeTejas v. Tex. Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000); Valenzuela v. O'Connell, No. CPF-06-506050 (San Francisco County Ct. Mar. 23, 2006), *vacated sub nom.* O'Connell v. Superior Court, 47 Cal. Rptr. 3d 147 (Ct. App. 2006).

the 1970s. MCTs were largely subsumed during the next decade by States' growing policy commitments to the educational standards and assessment movement. Presently, the federal No Child Left Behind Act (NCLB)[7]—particularly its adequate yearly progress requirements[8]—is the public face of high-stakes testing for K-12 education. NCLB also dramatically altered the high-stakes test setting and increased (and redirected) the consequences for schools and school districts.

A. Examples of High-Stakes Tests

In an effort to blunt fears that social promotion policies, unfocused curricula, and diluted academic standards combine to devalue the high school diploma,[9] States began to implement MCTs. In general, students who fail to achieve a certain mastery of core academic subjects, measured by MCTs, are either not promoted or not graduated (or both).[10] If students who fail to achieve an acceptable score on MCTs are nonetheless still entitled to graduate, such students typically receive a "certificate of attendance" rather than a full academic diploma.[11] Introduced in Oregon in 1973, MCTs quickly gained popularity and spread to other states.[12] By 1980, thirty-six states enacted some form of minimum competency testing program,[13] with fifteen states requiring satisfactory performance as a condition for graduation.[14]

Most states found it far easier to enact MCT legislation than to implement the tests.[15] Resistance to MCTs quickly emerged due to the legal and political fallout incident to students' failing MCTs and, in particular, not graduating.[16] As various States began to implement MCTs, initial failure rates (of eighth or ninth grade students) sometimes exceeded 30%.[17] Because non-white students and

---

7. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301–6578 (2006)).

8. 20 U.S.C. § 6311(b)(3).

9. *See* Thomas S. Dee, *Learning to Earn*, EDUC. NEXT, Summer 2003, at 65, 65.

10. *See id.* at 66.

11. *See, e.g.*, TENN. CODE ANN. § 49-6-6001 (West 2006 & Supp. 2008).

12. *See* Jeri J. Goldman, *Political and Legal Issues in Minimum Competency Testing*, 48 EDUC. FORUM 207, 208 (1984).

13. *Id.*

14. However, many states that made successful passage of MCT a condition for full high school graduation delayed the implementation of the graduation requirement to reduce legal exposure. *See* Thomas S. Dee, *The "First Wave" of Accountability*, *in* NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 215, 217 (Paul E. Peterson & Martin R. West eds., 2003).

15. Frederick M. Hess, *Refining or Retreating? High-Stakes Accountability in the States*, *in* NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 55, 55-56 (Paul E. Peterson & Martin R. West eds., 2003).

16. *Id.* at 56.

17. *Id.* at 70.

students from low-income households failed MCTs at rates that exceeded their white counterparts,[18] legal pressure against the tests mounted. Many states sought relief from such pressure by simply reducing the MCT failure rate to below five percent (and frequently below one percent) by the time the initial cohort of students was poised to graduate from high school.[19]

Most observers assumed that lawsuits would quickly follow in states where standards and assessments triggered palpable consequences for students and schools. Although fears of litigation from disappointed students were not misplaced,[20] increasingly careful planning by policymakers, greater attention to implementation details, focused deployment of additional resources, increased student preparation and remediation options, and an almost unlimited supply of second chances for students substantially reduced the prospects of lawsuits challenging high-stakes exit exams.[21]

Unlike most minimum competency tests, NCLB focuses its attention on schools rather than the students who attend them.[22] At its core, NCLB leverages State-created standards and assessments, increases transparency by disseminating data on progress, and imposes consequences on local schools and districts for insufficient annual student progress.[23] As commentators note, standardized tests are the fuel that runs the NCLB engine.[24] Annual test scores must be generated and aggregated at the school level and then disaggregated for a number of student subgroups that are traditionally underserved by public schools.[25] All of these student test scores are used to assess whether a school is achieving adequate yearly progress (AYP). Although states currently enjoy significant latitude in establishing yearly proficiency benchmarks, under NCLB almost all students must achieve academic proficiency.[26]

A sliding scale of consequences greets schools that do not achieve AYP.[27]

---

18. *See generally* Darryl Paulson & Doris Ball, *Back to Basics: Minimum Competency Testing and Its Impact on Minorities*, 19 URBAN EDUC. 5 (1984).

19. *See* Hess, *supra* note 15, at 70.

20. *See, e.g.*, Debra P. v. Turlington, 644 F.2d 397, 407 (5th Cir. Unit B May 1981) (striking Florida's use of a minimum competency exam that was a requirement for a full academic diploma due to the lingering legacy of school segregation).

21. *But see* Paul T. O'Neill, *Special Education and High Stakes Testing for High School Graduation: An Analysis of Current Law and Policy*, 30 J.L. & EDUC. 185, 195–216 (2001) (detailing suits challenging high-stakes testing regimes).

22. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 939 (2004) [hereinafter Ryan, *Perverse Incentives*].

23. *Id.* at 939-42.

24. *Id.* at 940.

25. 20 U.S.C. § 6311(b)(2)(C)(v)(II) (2006).

26. *Id.* § 6311(b)(2)(F).

27. *Id.* § 6316(b)(5), (8). A stricter set of consequences befalls schools that receive Title I funding and do not achieve AYP. Although Title I public schools are a subset of the entire population of public schools, over one-half of all public K-12 schools receive Title I funds. *See* Ryan, *Perverse Incentives*, *supra* note 22, at 942 (citing DEP'T OF EDUC., FACT SHEET ON TITLE I,

Federally-aided public schools that fail to achieve AYP are designated as needing "school improvement."[28] Schools failing to achieve AYP for two consecutive years must develop a school improvement plan after receiving technical assistance from the U.S. Department of Education.[29] Also, students assigned to such schools become eligible to select and attend a different public school within their district.[30] Schools that fail to demonstrate AYP for three consecutive years must provide, at district expense, individual tutoring services to students attending these schools.[31] After four consecutive years, schools must undertake one of several measures, ranging from replacing school staff to implementing a more challenging curriculum.[32] A school that fails to achieve AYP for five consecutive years runs the risk of having to engage in significant restructuring, including surrendering to district control, dissolving, or reopening as a charter school.[33]

Although the NCLB consequences for under-performance focus on schools, the fallout extends beyond the schools. Increasingly, state and local politicians believe they have vicarious political liability for struggling schools. As states increasingly centralize education policy control, governors become more interested in the fate of public schools. Moreover, homeowners remain economically tethered to local public-school performance, especially in affluent suburban neighborhoods where public school reputations (real or perceived) influence home values.[34] A desire to protect home equity exists independent of whether the homeowner has school-age children.[35] Similarly, local economic and businesses interests, especially those with critical skilled-labor requirements, possess an important stake in the success of local public school systems.[36]

B. Policy Rationales for High-Stakes Testing

High-stakes tests are one part of a larger standards and assessment movement. As Professor James Ryan notes, "[s]tandards and testing currently dominate the landscape of public education."[37] The current standards and assessment policy push flows partly from a building desire to hold students,

---

PART A (2002), *available at* http://www.ed.gov/rschstat/eval/disadv/title1-factsheet.doc).

28. 20 U.S.C. § 6316(a)(1)(B).

29. *Id.* § 6316(b)(1)(A).

30. *Id.* § 6316(b)(1)(E)(i).

31. *Id.* § 6316(b)(5)(B).

32. *Id.* § 6316(b)(7)(C)(iv).

33. *Id.* § 6316(b)(8)(B).

34. *See, e.g.*, Sandra E. Black, *Do Better Schools Matter? Parental Valuation of Elementary Education*, 114 Q.J. ECON. 577, 578 (1999) (noting a correlation between student test scores and residential home values).

35. *Id.*

36. *Id.* at 583.

37. James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1226 (2008) [hereinafter Ryan, *Standards, Testing, and Finance*].

schools, districts, and states more accountable for education results. Originally launched at the state level, the federal government, through NCLB, now functionally drives the standards and assessment policy.[38]

The 1983 publication of the *Nation at Risk* report,[39] along with other factors, helped launch the modern standards and assessment movement in many states. The report highlighted a curriculum that lacked focus, coherence, and rigor as well as a culture of low expectations for too many students.[40] The report's authors warned of an ominous "rising tide of mediocrity"[41] that posed a substantial threat to national economic security.[42] Reaction to the *Nation at Risk* report was both swift and substantial.[43] Proponents of heightened academic standards cited the report as support for increased attention to core academic subjects, high expectations and standards for all students, and greater accountability for outcomes through tests designed to gauge students' and schools' progress toward the academic standards.[44]

In response to *Nation at Risk*, many states began reviewing or, in some instances, articulating for the first time, goals for student educational outcomes. Writing in 1986 for the National Governor's Association report, *Time for Results*,[45] then-governor of Tennessee Lamar Alexander underscored the governors' collective commitment to meaningful standards and assessments.[46] Indeed, many governors boasted about their states' rigorous student performance standards and tethered them to efforts to make their states more economically competitive.[47] By 1992, nearly every state had increased course requirements for high school graduation.[48] The current education reform push continues to focus on refining challenging standards for student performance.

The impulse to centralize the standards and assessments efforts, however, did

---

38. *Id.* at 1224.

39. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

40. *See* Dee, *supra* note 14, at 217-18.

41. NAT'L COMM'N ON EXCELLENCE IN EDUC., *supra* note 39, at 5.

42. *Id.*

43. *See, e.g.*, Karen MacPherson, *A Nation Still at Risk; Two Decades Later Reports Still Focusing on the Mediocrity of U.S. Education*, PITT. POST-GAZETTE, Aug. 31, 2003, at A11.

44. For a helpful summary of the social history of the standards and assessment movement, see generally CHESTER E. FINN, JR., WE MUST TAKE CHARGE: OUR SCHOOLS AND OUR FUTURE (1991); DIANE RAVITCH, LEFT BACK: A CENTURY OF FAILED SCHOOL REFORMS (2000); Ryan, *Perverse Incentives*, *supra* note 22, at 938.

45. NATIONAL GOVERNORS' ASS'N, TIME FOR RESULTS: THE GOVERNORS' 1991 REPORT ON EDUCATION (1991).

46. Lamar Alexander, *Chairman's Summary* to NATIONAL GOVERNORS' ASS'N, *supra* note 45, at 3.

47. *See, e.g.*, Tony Freemantle, *New Education Chief Hailed as "Visionary,"* HOUS. CHRON., Dec. 22, 1992, at A6; George Uhlig, *Alabama Needs Systemic Change, New Educational Vision*, MOBILE REGISTER (Ala.), Dec. 5, 1993, at C3.

48. *See* Dee, *supra* note 14, at 218.

not end with the governors. Seeking to leverage a movement already underway, the federal government launched efforts to complement the largely state-initiated standards and assessment movement. In his 1997 State of the Union Address, President Clinton called for "a national crusade for education standards—not Federal Government standards, but national standards representing what all of our students must know to succeed in the knowledge economy of the 21st century."[49] In the mid-1990s, Congress staked its own claim in the education policy debate by passing the Improving America's Schools Act (IASA),[50] which directed federal Title I funds towards state standards and assessment efforts.[51] States were required to develop challenging standards and assessments for all students and all schools. Critically, these requirements did not apply solely to Title I-eligible schools[52] as Congress sought to ensure that all states developed challenging academic expectations for all schools, regardless of a school's student composition.

Even more dramatic legislative action soon followed. Congress passed NCLB in 2001 with significant bi-partisan support and fanfare.[53] The Act builds on earlier federal statutes in several important ways. Now, states desiring federal Title I funds must establish school accountability systems that include annual student tests of math, reading, and science proficiency for grades three through eight.[54] States are also obligated to gather, report, and disseminate aggregate test results for all students as well as for various student subgroups that contain a minimum number of students.[55] Although state standards must be "challenging,"[56] NCLB essentially leaves it to the states to establish their own standards and assessments, as well as proficiency thresholds.[57] However a state defines proficiency, virtually every student must achieve it by 2014.[58]

---

49. *President Clinton's Message to Congress on the State of the Union*, N.Y. TIMES, Feb. 5, 1997, at A20.

50. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended in scattered sections of 20 U.S.C.).

51. *See, e.g.*, 20 U.S.C. § 6311(b)(1) (current version at 20 U.S.C. § 6311(b)(1) (2006)).

52. 20 U.S.C. § 6311(b)(3) (2006).

53. *See, e.g.*, Elisabeth Bumiller, *Focusing on Home Front, Bush Signs Education Bill*, N.Y. TIMES, Jan. 9, 2002, at A16; *The State of the Union: President Bush's State of the Union Address to Congress and the Nation*, N.Y. TIMES, Jan. 30, 2002, at A16.

54. 20 U.S.C. § 6311(b)(3)(C)(v)(II) (providing for the addition of science testing beginning in the 2007 school year).

55. *Id.* § 6311(h).

56. *Id.* § 6311(b)(1).

57. *Id.* § 6311(b)(2). Although NCLB does not require states to submit their standards to the Secretary of Education for review, states must submit plans that demonstrate a commitment to challenging academic standards. *See id.* § 6311(b)(1)(A).

58. *Id.* § 6311(b)(2)(F).

II. RECENT HIGH-STAKES TESTING LITIGATION

High-stakes testing is designed to impose consequences for many students, schools, and districts. The imposition of consequences for under-performance disrupts the education status quo along with individual and institutional interests. Not surprisingly, high-stakes tests stimulate litigation efforts seeking to blunt the consequences flowing from low test scores. Much of the litigation pursues one of three broad legal claims (or a combination of two or more claims): due process, equal protection, or statutory allegations (notably Title VI). A review of two recent lawsuits highlights important themes.

A. GI Forum

In 1985, after a decade-long struggle over the direction of school reform in Texas, state lawmakers implemented the Texas Educational Assessment of Minimum Skills (subsequently replaced by the Texas Assessment of Academic Skills (TAAS)) as one piece of a larger school reform initiative.[59] The Texas Assessment of Knowledge and Skills (TAKS), introduced in 2003, replaced TAAS.[60] Results from the TAKS not only implicate students, but also schools and school districts that are assessed based on data generated by the exam.

TAAS and TAKS afforded students with remedial assistance and multiple opportunities to pass the exit exam. Under TAAS, students were permitted eight chances to pass before the completion of their senior year.[61] TAKS is even more indulgent and gives students an unlimited number of chances to pass.[62] Moreover, students who leave high school without a full academic diploma can continue taking TAKS and will receive a diploma retroactively upon passage.[63]

Similar to the distributions in other states that impose exit exams, test failure rates in Texas were distributed unevenly across various student subgroups.[64] Notably, African-American and Hispanic students failed at disproportionate rates.[65] Representing minority students who failed the exit exam and were denied high school diplomas, attorneys from the Mexican American Legal Defense Fund (MALDEF) sued the State of Texas alleging that Texas's exit exam violated students' equal protection, due process, and statutory rights.[66] Among the

---

59. For a discussion of the Texas Assessment of Academic Skills (TAAS) as well as its even more rigorous successor, the Texas Assessment of Knowledge and Skills (TAKS), see Keith L. Cruse & Jon S. Twing, *The History of Statewide Achievement Testing in Texas*, 13 APPLIED MEASUREMENT IN EDUC. 327, 329-30 (2000); Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 649.

60. TEX. EDUC. CODE ANN. § 39.025 (Vernon 2006).

61. GI Forum Image De Tejas v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 673 (W.D. Tex. 2000).

62. TEX. EDUC. CODE ANN. § 39.025 (Vernon 2006).

63. *Id.*

64. *GI Forum*, 87 F. Supp. 2d at 675.

65. *Id.*

66. *Id.* at 668.

numerous legal claims asserted, only the students' statutory Title VI claim proceeded to trial.[67]

Within the Title VI context, the court dwelled on the stark disparity in pass rates between white and non-white students.[68] Expert witnesses helped frame the focus on the pass rate disparity as both sides agreed that the initial administration of the exit exam adversely impacted non-white students[69] and that statistically significant, though lower, disparities existed in the cumulative exam pass rates.[70] On the basis of largely uncontested statistical evidence, the trial court in *GI Forum* concluded that the plaintiffs successfully established a prima facie discrimination claim against the state's exit exam.[71]

Despite the minority students' victory in establishing a prima facie discrimination case, the State of Texas successfully defended its exit exam as a legitimate exercise in educational policymaking authority notwithstanding the exit exam's disparate impact on non-white students.[72] The trial court concluded that the exit exam was intended to advance education reform in Texas and that the high-stakes graduation requirement was justified, in part, because it "encouraged learning."[73] The court also rejected the plaintiffs' assertion that equally effective yet less disparate alternatives to the exit exam existed.[74] Moreover, the court noted that the State provided adversely affected students remedial classes expressly geared toward passing the exit exam.[75] Consequently, Judge Prado ruled against the students and declined to interfere with the Texas exit exam's implementation.[76]

B. O'Connell

In 1999, California joined a growing line of states that imposed the successful completion of a state-wide exit exam as a condition for a student receiving a full high school diploma.[77] State lawmakers implemented the California High School Exit Exam (CAHSEE) in conjunction with a larger statewide effort that endeavored to bolster academic standards and assessments.[78] Students begin taking CAHSEE while in tenth grade and are afforded multiple

---

67. *Id.*
68. *Id.* at 676-82.
69. *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 398 n.106 (2007).
70. *Id.* at 397-98.
71. *GI Forum*, 87 F. Supp. 2d at 679.
72. *Id.* at 671.
73. *Id.* at 681.
74. *Id.* at 681–82 (citing Debra P. v. Turlington, 730 F.2d 1405, 1416 (11th Cir. 1989)).
75. *Id.* at 676.
76. *Id.* at 683-84.
77. *See* CAL. EDUC. CODE §§ 60850-60859 (West 2003 & Supp. 2008).
78. *See* Arturo J. González & Johanna Hartwig, *Diploma Denial Meets Remedy Denial in California: Tackling the Issue of Remedies in Exit Exam Litigation After the Vacated* Valenzuela v. O'Connell *Preliminary Injunction*, 47 SANTA CLARA L. REV. 711, 715-16 (2007).

opportunities to re-take it.[79]

Testing began in 2001 for California's high school students (freshmen) planning to graduate in 2004.[80] By the summer of 2002, however, less than one-half of the class of 2004 had passed the exam.[81] Moreover, Latino, African-American, and low-income students were far less likely to pass.[82] As a consequence, the California State Board of Education voted to delay denying diplomas to students until 2006.[83] The two-year implementation delay was designed to provide students and schools with even more time to adjust to (and pass) CAHSEE. However, as graduation for the class of 2006 approached, many students still had not passed CAHSEE and, as a consequence, were ineligible to graduate.[84] With the looming prospect of denying high school diplomas to thousands of California high school students, a class action lawsuit was filed in state court to enjoin the State from withholding diplomas from those students who had not passed the exit exam.[85]

In *Valenzuela v. O'Connell*,[86] the trial court judge enjoined CAHSEE's implementation for another year because the harm to the State in delaying implementation was outweighed by the harm arising from denying otherwise qualified students their high school diplomas.[87] Harms to the students included claims relating to equal protection and the right to an education.[88] Anxious to appeal the injunction and obtain quick and definitive legal guidance from the California Supreme Court, the State sought to bypass the court of appeals.[89] The supreme court sent the matter to the state appellate court rather than deciding the merits of the injunction.[90]

After hearing from both parties at oral argument and numerous others in amici curiae briefs, the three-judge appellate panel sided with the State and vacated the trial court's preliminary injunction.[91] While the appellate court agreed with the trial court that the plaintiffs were likely to prevail on their equal educational opportunity denial claims,[92] the appellate court nonetheless concluded that upholding the trial court's injunctive relief would amount to an

---

79. *Id.* at 716.

80. *Id.* at 718.

81. *Id.*

82. *Id.* at 719.

83. *Id.* at 718.

84. *Id.* at 725-26.

85. *Id.* at 728-29.

86. Valenzuela v. O'Connell, No. CPF-06-506050 (San Francisco County Ct. Mar. 23, 2006), *vacated sub nom.* O'Connell v. Superior Court, 47 Cal. Rptr. 3d 147 (Ct. App. 2006).

87. González & Hartwig, *supra* note 78, at 731 (discussing the motions and disposition of *Valenzuela*).

88. *Id.* at 729.

89. *Id.* at 731.

90. *Id.* (citing O'Connell v. Superior Court, No. JCCP-4468, slip op. (Cal. May 24, 2006)).

91. *O'Connell*, 47 Cal. Rptr. 3d at 150.

92. *Id.* at 157.

improper encroachment onto legislative terrain.[93] The appellate court ruling, which supported California's high-stakes exit exam, prompted a settlement among the litigating parties.[94]

Despite the plaintiffs' disappointment with the outcome in *O'Connell*, the subsequent settlement culminated in new state legislation that established important benefits and services for students who struggle with CAHSEE.[95] Under the new law, students are entitled to two additional years of instruction if they have not passed the exam by the end of their senior year.[96] This supplemental instruction focuses on preparing students for the exit exam. Also, the law entitles students whose primary language is not English to two additional years of language instruction to better prepare them to pass the exam.[97]

III. AN EMERGING JUDICIAL AWARENESS OF UNANTICIPATED POLICY CONSEQUENCES

During the early 1980s, prior to the Texas and California exit exam litigation, Florida courts struggled mightily with that state's exit exam, principally due to discrimination claims.[98] Unlike what Texas and California policymakers experienced, however, in Florida, protracted litigation and numerous court decisions contributed to a multi-year delay in the implementation of the Florida exit exam. What explains the difference between the litigation experience in Florida and the more recent litigation in Texas and California? After all, similar to the Florida courts, the Texas[99] and California[100] courts noted the exit exams' disparate impact on non-white students. Indeed, in *O'Connell*, the appellate court felt that the plaintiffs were likely to *prevail* in establishing their equal educational opportunity denial claims.[101] Notwithstanding the high-stakes exams' deleterious impact on non-white students, however, the Texas[102] and California[103] courts declined to meaningfully interfere with the state exit exams.

Among the factors that influenced the outcomes in *GI Forum* and *O'Connell*

---

93. *Id.* at 165.

94. For a discussion of the settlement, see González & Hartwig, *supra* note 78, at 743–51.

95. Assemb. B. No. 347, 2007 Leg., 2007-08 Sess. (Cal. 2007) (amending CAL. EDUC. CODE §§ 1240, 35186, 37254, 52378, and 52380), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0301-0350/ab_347_bill_20071012_chaptered.pdf.

96. *Id.*

97. *Id.*

98. *See* Debra P. v. Turlington (*Debra P. I*), 474 F. Supp. 244, 249 (M.D. Fla. 1979), *aff'd in part, vacated in part*, 644 F.2d 397 (5th Cir. Unit B May 1981), *remanded to* 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984).

99. GI Forum Image DeTejas v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 675-76 (W.D. Tex. 2000).

100. O'Connell v. Superior Court, 47 Cal. Rptr. 3d 147, 170 (Ct. App. 2006).

101. *Id.* at 157.

102. *GI Forum*, 87 F. Supp. 2d at 683-84.

103. *O'Connell*, 47 Cal. Rptr. 3d at 171.

were the states' and school districts' modifications to their high-stakes tests, which made them less vulnerable to legal attack. Specifically, Texas and California policymakers benefitted from prior litigation in other states, notably Florida, and adjusted their high-stakes testing policies in ways that made them more sensitive to the important due process factors that exit exams implicate. In particular, exit exams in Texas and California paid greater attention to procedural and substantive concerns, including notice, multiple chances to take tests, greater supplemental resources to needy students, and serious attention to the tests' content validity.[104]

In addition to states crafting more litigation-sensitive exit exams, the more recent court decisions also suggest that courts became increasingly sensitive to the unanticipated consequences that flow from court decisions that disrupt high-stakes testing policies. These consequences include various financial costs triggered by high-stakes testing litigation. Other policy consequences, including those that the *GI Forum* and *O'Connell* decisions specifically reference, involve efforts to shore up the currency of the high school diploma and to improve student and school performance.[105]

A. Secondary and Tertiary Policy Consequences Flowing from High-Stakes Testing Litigation

Litigation challenging high-stakes tests imposes important financial and policy costs. Indeed, the mere specter of litigation, including lawsuits *unlikely* to prevail, imposes such costs. Even though the trend suggests that legal challenges to high-stakes tests are unlikely to succeed against tests that are carefully planned and crafted, successfully defending against a lawsuit claims financial resources. For cash-strapped states in particular, the potential for such costs might be sufficient to prompt States to lower student proficiency thresholds in an effort to reduce both legal exposure and political fallout.

Another financial implication, though derivative, involves costs associated with school finance advocates who successfully leverage poor test results into legal claims for increased education spending, principally through adequacy lawsuits.[106] Although the school finance litigation and high-stakes testing movements began independently of one another, the emergence of adequacy theory in school finance litigation helped forge a link between the movements.

---

104. *GI Forum*, 87 F. Supp. 2d at 672-73; *O'Connell*, 47 Cal. Rptr. 3d at 156-57.

105. *GI Forum*, 87 F. Supp. 2d at 681-82; *O'Connell*, 47 Cal. Rptr. 3d at 160-61.

106. *See, e.g.*, Michael Heise, *Adequacy Litigation in an Era of Accountability*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 262–66 (Martin R. West & Paul E. Peterson eds., 2007); Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, *in* SCHOOL MONEY TRIALS 1, 6 (Martin R. West & Paul E. Peterson eds., 2007); James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 378 (1990); *cf.* Ryan, *Standards, Testing, and Finance*, *supra* note 37, at 1224 (noting, although disagreeing with, the conventional wisdom); Marshall S. Smith, *What's Next?*, EDUCATION WEEK, Jan. 5, 2006, at 66.

By design, high-stakes exit exams generate data germane to student and school performance. Results from high-stakes tests—in particular, poor results—provide critical evidence for litigants seeking a declaration from courts that schools or districts are "inadequate" as a matter of state constitutional law.[107] Thus, litigation that interferes with high-stakes tests unsettles a link between high-stakes testing and school finance litigation efforts.

Litigation challenging high-stakes exit exams imposes non-financial costs as well. One such cost prompted by legal exposure from exit exams is pressure to dilute academic standards, such as exit exam "cut-scores." In Texas, as the *GI Forum* opinion notes, policymakers temporarily bowed to such pressures by initially setting the exit exam cut-score at 60% and phasing-in the 70% cut-score one year later.[108] The initial 60% cut-score was used even though policymakers generally felt that a 70% score reflected sufficient "mastery" of essential academic skills for purposes of awarding a high school diploma.[109] By reducing the passing score in the exit exam's initial year, however, Texas policymakers substantially reduced the number of failing students and, in so doing, reduced initial political (and legal) opposition to the exit exam.[110]

States' experiences with setting (or resetting) standards after NCLB also illustrate how such perverse incentives operate. Prior to NCLB, many states, notably Southern states, began a campaign to increase standards for their students.[111] Indeed, prior to the late 1990s, many states engaged in something resembling a "race to the top" in terms of developing and implementing rigorous student achievement goals.[112] Transforming high academic standards into a legal sword against schools and districts, however, blunted a policy drive toward more rigorous standards. Diluting standards and proficiency levels directly reduces the number of potential plaintiffs with standing to legally challenge exit exam policies.

It is important to note, however, that litigation challenging high-stakes testing did not generate only dead-weight financial and policy costs. Early litigation influenced the design of more recent high-stakes tests. For example, many states and districts now provide greater supplemental services and remedial resources to at-risk students to better prepare them for high-stakes tests. In addition, states take greater pains to content validate their tests.[113] Although such changes undoubtedly add to the financial cost of implementing high-stakes tests, such

---

107. *See, e.g.*, sources cited *supra* note 106.

108. *GI Forum*, 87 F. Supp. 2d at 673.

109. *Id.*

110. *See id.*

111. *See* Michael Heise, *The 2006 Winthrop and Frances Lane Lecture: The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119, 128–31 (2007).

112. *See* Molly O'Brien, *Free at Last? Charter Schools and the "Deregulated" Curriculum*, 34 AKRON L. REV. 137, 159 (2000).

113. *GI Forum*, 87 F. Supp. 2d at 681-82; O'Connell v. Superior Court, 47 Cal. Rptr. 3d 147, 160-61 (Ct. App. 2006).

changes also contribute to more accurate and equitable tests.

B. Evidence of Increased Judicial Awareness of Policy Consequences

The *GI Forum* and *O'Connell* opinions contain language that hints at increased judicial awareness of the policy consequences that flow from court decisions disrupting high-stakes testing policy. Of particular note to both courts were consequences to the integrity of the high school diploma as well as broader State efforts to improve student and school performance.[114]

To be sure, the *GI Forum* opinion conveys the Texas court's distinct unease with the prospect of the judiciary having to take sides in these education policy fights. The opinion notes that it would be improper for the court to assess the policy wisdom of Texas' high-stakes exit exam.[115] The Texas judge also observed that the State's requirement that students pass an exit exam reflected the State's "insistence on [educational] standards."[116] Moreover, in discussing the policymakers' decision about where to set proficiency levels, the opinion makes clear that "the Court cannot pass on the State's determination of what, or how much, knowledge must be acquired prior to high school graduation."[117]

Although portions of the *GI Forum* opinion convey the court's desire to remain policy-neutral, other parts of the opinion illustrate how the court expressly engaged with various components of high-stakes testing policy. In its assessment of various testing policies, the court makes clear that it had "taken into account the immediate impact of initial and subsequent in-school failure of the exam."[118] The opinion also notes with approval that through the exit exam, Texas officials sought to "hold schools, students, and teachers accountable for education"[119] and that the high-stakes test effectively achieves its objectives.[120] More specifically, the court concluded that the Texas exit exam "boosted student motivation and encouraged learning."[121] In so doing, according to the court, the Texas exit exam helps make high school diplomas in Texas "uniformly meaningful."[122]

California judges in the *O'Connell* opinion displayed a similar desire to remain above the education policy fray yet not blind themselves to the consequences of court interference with high-stakes testing. The *O'Connell* opinion begins by dutifully noting the court's obligation to "'respect the separate constitutional roles of the Executive and the Legislature.'"[123] In the opinion's

---

114. *GI Forum*, 87 F. Supp. 2d at 681-82; *O'Connell*, 47 Cal. Rptr. 3d at 160-61.

115. *GI Forum*, 87 F. Supp. 2d at 670.

116. *Id.*

117. *Id.*

118. *Id.* at 678.

119. *Id.* at 679.

120. *Id.* at 679-80.

121. *Id.* at 681.

122. *Id.*

123. O'Connell v. Superior Court, 47 Cal. Rptr. 3d 147, 155-56 (Ct. App. 2006) (quoting Butt

very next sentence, however, the judges evidenced a certain level of policy sensitivity when noting their obligation to "'strive for the least disruptive remedy adequate to . . . [the judiciary's] legitimate task.'"[124] In even blunter language elsewhere in the opinion, the California judges make clear their awareness of the "fundamental issues of public policy implicated in the case now before" them.[125]

Similar to the *GI Forum* opinion, the *O'Connell* opinion also pays homage to the policy goal of trying to resurrect the integrity of the high school diploma. The California court noted that if it was to strike down California's exit exam and thereby permit students who have failed to master basic academic content to graduate with full diploma privileges, the high school diploma would be "debase[d]" and thus lose further meaning and currency.[126] The *O'Connell* opinion also conveys the judges' desire to not interfere with the State's policy goal of raising academic standards in California's public schools.[127] Enjoining the State's use of exit exams, the judges implicitly suggested, would impede this policy goal.

CONCLUSION

For better or worse (or, more accurately, for better *and* worse), high-stakes testing increasingly dominates the American K-12 education policy terrain. Litigation seeking to disrupt high school exit exams implicates important education policy interests. As both the *GI Forum* and *O'Connell* decisions illustrate, however, courts today appear reluctant to interfere with the implementation of well-crafted exit exams due to complexities inherent in such judicial intervention.

There are many reasons for emerging judicial reluctance. One critical reason is that today's exit exams have learned from the past and have evolved in ways that reduce their legal exposure. Language in the *GI Forum* and *O'Connell* decisions also suggest that courts have become increasingly mindful of the policy consequences that flow from court decisions interfering with exit exams.[128] These policy consequences include financial repercussions, ranging from the legal costs incident to litigation to the growing link between data from exit exams and school finance litigation. Reflecting a consensus that has gained momentum since the late-1980s—that school reform is necessary—the *GI Forum* and *O'Connell* opinions convey important deference to a state's desire to take responsible steps designed to enhance the integrity of the high school diploma and improve academic achievement,[129] even if it means that a disproportionate

---

v. State, 842 P.2d 1240, 1258 (Cal. 1992)).

124. *Id.* at 156 (quoting *Butt*, 842 P.2d at 1258).

125. *Id.* at 170.

126. *Id.* at 161.

127. *Id.*

128. *See supra* Part III.B.

129. GI Forum Image DeTejas v. Tex. Educ. Agency, 87 F. Supp. 2d 667, 681-82 (W.D. Tex. 2000); *O'Connell*, 47 Cal. Rptr. 3d at 160-61.

number of non-white students will not receive high school diplomas.

To the extent that the central point of this Article is correct—that court decisions display a sensitivity to the education policy consequences from disrupting exit exams—a normative question quickly arises: *Should* judges concern themselves with the practical policy fallout from their decisions? Although such a discussion extends far beyond the contours of this Article, a few points help frame some of the question's salient aspects. On the one hand, the traditional separation of powers doctrine suggests that judges should confine themselves to legal arguments and leave policy arguments and concerns to their legislative and executive counterparts. Moreover, by definition, arguments about policy consequences triggered by decisions not yet rendered are, to some unknown degree, speculative. On the other hand, as difficult separation of powers cases make clear, the line between law and policy is frequently blurred. In some instances policy consequences might necessarily follow from the resolution of purely legal questions. While the policy consequences in any individual case may be speculative in the formal sense, causation between a legal decision and policy consequences might be robustly established by prior cases.

Regardless of whether judges should concern themselves with the policy ramifications incident to litigation seeking to disrupt the implementation of exit exams, as an empirical matter the *GI Forum* and *O'Connell* decisions suggest that they are concerned. Whether legal scholars, lawmakers, policymakers, or citizens should, in turn, be concerned about judges' policy concerns is a question for another day.

STATE TAKEOVERS OF SCHOOL DISTRICTS: RACE AND THE EQUAL PROTECTION CLAUSE

JOSEPH O. OLUWOLE*
PRESTON C. GREEN, III**

INTRODUCTION

State takeover of school districts is a form of education reform designed to promote educational and financial stability in school districts. In 1989, New Jersey became the first state in the country to take over a district.[1] Kentucky followed the same year.[2] By 1989, six states had enacted State takeover laws.[3] By 2004, the number increased to twenty-nine states.[4] Most takeovers occurred between 1995 and 1997.[5] Before this peak, it is estimated that "60[%] of the takeovers were for purely financial and/or management reasons, while only 27[%] were comprehensive takeovers that included academic goals. In the three years after 1997, however, the percentage of comprehensive takeovers ha[d] risen to 67[%]."[6]

State statutes and administrative codes often set forth grounds for State takeovers of districts.[7] Forms of takeovers include: gubernatorial appointment

---

* Attorney-at-law and Assistant Professor of Education and Law, Montclair State University. J.D., Ohio State University; Ph.D., Educational Leadership, Penn State University.

** Professor of Education and Law, The Pennsylvania State University Dickinson School of Law. J.D., Columbia University; Ed.D., Columbia University, Teachers College.

1. MARIA CHAPPELLE-NADAL, SCHOOL REFORM STRATEGIES 7 (2007), *available at* http://pubdef.net/downloads/Nadal-Report-on-State-Takeovers.pdf; *see also* NATIONAL CENTER FOR EDUCATIONAL ACCOUNTABILITY, JERSEY CITY 4 (2006), *available at* http://www.broadprize.org/asset/2006JerseyCityPublicSchoolsOverview.pdf.

2. Bruce C. Bowers, State-Enforced Accountability of Local School Districts, ERIC CLEARINGHOUSE ON EDUCATIONAL MANAGEMENT (1989), *available at* ERIC, http://www.thememoryhole.org/edu/eric/ed309556.html.

3. *See id.* (identifying Kentucky, New Jersey, New Mexico, South Carolina, Texas, and West Virginia as states with takeover legislation); *see also N.J. First to Attempt Complete Takeover*, EDUC. WK., June. 1, 1988 (identifying all the abovementioned states except West Virginia).

4. TAKEOVERS: STATE TAKEOVERS AND RECONSTITUTIONS 1, EDUC. COMM'N OF THE STATES (2004), *available at* http://www.ecs.org/clearinghouse/51/67/5167.htm [hereinafter TAKEOVERS].

5. Kenneth K. Wong & Francis X. Shen, *City and State Takeover as a School Reform Strategy*, ERIC CLEARINGHOUSE ON URBAN EDUCATION 2 (2002), *available at* ERIC, http://purl.access.gpo.gov/GPO/LPS43146.

6. *Id.* Wong & Shen use the term "comprehensive takeover" to refer to takeovers that "include financial, managerial, and academic components." *Id.*

7. TAKEOVERS, *supra* note 4, at 3; David R. Berman, *Takeovers of Local Governments: An Overview and Evaluation of State Policies*, PUBLIUS, Summer 1995, at 55, 64-70 (1995); Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1847-49 (1999) (discussing how states use statutes to integrate

of an executive official or board to manage the district; state board of education takeover; and mayoral appointment of an official and/or board to manage the district.[8] In some takeovers, the elected board is maintained as an advisory board.[9] According to policy analyst Todd Ziebarth, "[S]tate takeovers, for the most part, have yet to produce dramatic and consistent increases in student performance, as is necessary in many of the school districts that are taken over."[10]

A key complaint about State takeovers arises when an elected school board is partially or completely replaced with appointees. Critics contend such takeovers disenfranchise voters, particularly in districts where minorities constitute the majority of the electorate.[11] In 2004, over 50% of students in 74% of the districts taken over were minorities.[12] Additionally, 63% of the schools taken over as of 2004 were "in central cities (large and midsize) or in the urban fringe of a large city. All but three of these districts had high minority populations, ranging from 51% to 96%."[13] Moreover, according to Katrina Kelly, the director of urban school district advocacy at the National School Boards Association, "'Black and Hispanic school board members feel they are being targeted.'"[14] This ostensibly racially disproportionate takeover of minority school districts prompts our analysis in this Article.

The first Part reviews the No Child Left Behind Act of 2001 (NCLB)[15] provision for State takeovers of school districts and State takeover laws. The second Part examines the racial physiognomy of various State takeovers around the nation. The final Part explores state takeovers of minority school districts under the Equal Protection Clause. The conclusion focuses on the various implications of State takeovers.

---

accountability into their education policy).

8. EDUC. COMM'N OF THE STATES, ACCOUNTABILITY—REWARDS AND SANCTIONS: STATE TAKEOVERS AND RECONSTITUTIONS 2 (2002), *available at* http://www.ecs.org/clearinghouse/13/59/1359.htm [hereinafter ACCOUNTABILITY].

9. *See id.*

10. *Id.*; *see also* RICHARD C. SEDER, BALANCING ACCOUNTABILITY AND LOCAL CONTROL: STATE INTERVENTION FOR FINANCIAL AND ACADEMIC STABILITY 5-9 (2000), *available at* http://www.reason.org/ps268.pdf.

11. *See* Reynolds v. Sims, 377 U.S. 533, 554-55 (1964) (stating that each citizen is entitled to vote on an equal footing in elections as every other citizen, and this right to vote is fundamental and cannot be diluted, debased, or abridged); Beth Reinhard, *Racial Issues Cloud State Takeovers*, EDUC. WK., Jan. 14, 1998, at 1 [hereinafter Reinhard, *Racial Issues*].

12. PATRICIA CAHAPE HAMMER, CORRECTIVE ACTION: A LOOK AT STATE TAKEOVERS OF URBAN AND RURAL DISTRICTS 3 (2005), *available at* http://www.edvantia.org/products/pdf/PBStateTakeovers.pdf.

13. *Id.*

14. Reinhard, *Racial Issues*, *supra* note 11.

15. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

I. TAKEOVERS UNDER THE NCLB AND STATE LAWS

This Part provides an overview of the NCLB's accountability system and State takeover provisions. Additionally, this Part discusses several State takeover laws.

A. Takeovers: NCLB Provisions

The NCLB was enacted to ensure educational accountability.[16] States receiving Title I funds must implement an accountability system founded on State achievement standards and assessments.[17] Under the NCLB's accountability system, districts failing to make adequate yearly progress (AYP) on state assessments[18] are subject to sanctions under the Act, including State takeover of the district.[19] States and school districts must disaggregate data on the yearly progress of "racial and ethnic groups;"[20] the "economically disadvantaged,"[21] "students with disabilities;"[22] and "students with limited English proficiency."[23] Each year, in grades 3 through 8[24] and at a minimum once during grades 10 through 12,[25] States must assess students in science in mathematics, reading or language arts.[26] States must also assess students in science at least once each during grades 3 through 5,[27] 6 through 9,[28] and 10 through 12.[29]

NCLB requires that districts failing to make AYP for two consecutive years be "identif[ied] for improvement"[30] and develop an improvement plan.[31] Those districts not making AYP for four consecutive years are identified for corrective

---

16. *See* 20 U.S.C. § 6301 (2006) (listing methods to improve equal access to high-quality education).

17. *Id.* §§ 6311, 6316(c).

18. *Id.* § 6316(c).

19. *See id.* § 6316(c)(10)(C). The NCLB imposes various requirements and sanctions on schools and states accepting Title I funds. *Id.* § 6311; *see also* Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and Parents Involved*, 5 HASTINGS RACE & POVERTY L.J. 271, 274-76 (2008).

20. 20 U.S.C. §§ 6311(b)(2)(C)(v)(II)(bb), 6316(a), (c) (2006).

21. *Id.* §§ 6311(b)(2)(C)(v)(II)(aa), 6316(a), (c).

22. *Id.* §§ 6311(b)(2)(C)(v)(II)(cc), 6316(a), (c).

23. *Id.* §§ 6311(b)(2)(C)(v)(II)(dd), 6316(a), (c).

24. *Id.* § 6311(b)(3)(C)(vii).

25. *Id.* § 6311(b)(3)(C)(v)(I)(cc).

26. *Id.* §§ 6311(b)(3)(C)(v)(I), 6311(b)(2)(C)(vii).

27. *Id.* § 6311(b)(3)(C)(v)(II)(aa).

28. *Id.* § 6311(b)(3)(C)(v)(II)(bb).

29. *Id.* § 6311(b)(3)(C)(v)(II)(cc).

30. *Id.* § 6316(c)(3).

31. *Id.* § 6316(c)(7).

action.[32] The State must take at least one corrective action under the NCLB to address the failure of the district to make AYP.[33] Three of the NCLB's corrective actions could provide authority for State takeover of school districts: (1) replacement of district personnel "relevant to the failure to make [AYP]";[34] (2) appointment of a trustee or receiver through the state department of education to manage the district's affairs;[35] and (3) restructure or dissolution of the school district.[36] The district could subsequently emerge from State takeover or other corrective action by making AYP for two consecutive years.[37]

B. Takeovers: State Laws

This section examines some state laws providing for State takeovers and provides a brief overview of such laws. As indicated earlier, several states now have State takeover laws.

1. Alabama.—As part of an accountability system in Alabama, the State Board of Education must establish an assistance program for districts identified as "in need of assistance."[38] The assistance program entails a review of the district's low student achievement and efforts to improve the achievement levels.[39] If there is no progress in student achievement after three years relative to the prior year, the state superintendent must take over the district.[40] Alabama also has a law providing for the takeover of fiscally-distressed districts through the appointment of a "chief financial officer to manage the fiscal operation of a local board of education."[41] Alabama provides for election and appointment of school board members.[42]

2. Alaska.—Alaska allows the State to take over districts not meeting AYP on State assessments for at least four years in each of grades 3 through 5, 6

---

32. *Id.* § 6316(c)(10)-(11).

33. *Id.* § 6316(c)(10)(C).

34. *Id.* § 6316(c)(10)(C)(iii).

35. *Id.* § 6316(c)(10)(C)(v).

36. *Id.* § 6316(c)(10)(C)(vi). The restructure of a district might entail changing its structure from elective to appointive system of selection for board members.

37. *Id.* § 6316(c)(11); *see also id.* § 6316(c).

38. ALA. CODE § 16-6B-3(c) (2001). A district in need of assistance refers to "any local board of education which has a majority of its schools, or a majority of the students in a system, in which the students are scoring one or more grade levels below the prescribed norm." *Id.*

39. *Id.* § 16-6B-3(c)(1).

40. *Id.* § 16-6B-3(c)(3).

41. ALA. CODE § 16-6B-4 (2001 & Supp. 2008).

42. For example, statutory law requires the election of the state's county boards of education. ALA.CODE § 16-8-1 (2001). These county boards have discretion to create five or seven "single member election [local school] districts with one board member elected from each district." *Id.* § 16-8-1(b); *see also id.* § 16-11-2; ALA. CODE § 45-8A-21 (2005); ALA. CODE § 45-13-100.20 (2007).

through 8, and 9 through 10.[43] As with the NCLB, those districts face corrective actions, including: (1) replacement of district personnel relevant to the failure to make AYP[44] and (2) appointment of a trustee or receiver to run the district.[45] The state requires election of board members.[46]

3. Arizona.—Arizona permits takeovers of districts that have "systemic educational mismanagement."[47] The district *must* have six or more schools in the district and at least 50% of the district's schools *must* either underperform or fail to satisfy the state's academic standards.[48] The State may also take over districts that are insolvent or grossly mismanaged.[49] The law is forceful that takeovers not impede the election of board members.[50] The receiver running the district after the takeover has authority to supersede decisions made by the elected board or superintendent.[51] The state provides for election of board members.[52]

---

43. ALASKA ADMIN. CODE tit. 4, § 06.840 (2008); *see also id.* §§ 06.835(b), .840(k). These provisions apply to districts receiving federal funds under Part A of Title I of the NCLB. *See* 20 U.S.C. §§ 6301-6339 (2006).

44. ALASKA ADMIN. CODE tit. 4 § 06.840(k)(3) (2008).

45. *Id.* § 06.840(k)(6).

46. *See* ALASKA STAT. §§ 14.08.041, 14.08.045, 14.08.051, 14.08.071, 14.08.081, 14.12.030, 14.12.040, 14.12.050, 14.12.070, 14.12.080, 14.12.110, 14.14.070, 14.14.120, 29.20.300 (2008); ALASKA ADMIN. CODE tit. 6, § 27.010 (2008). In various states, vacancies on the boards can be filled by appointment until the next election. *See* ALASKA STAT. § 14.12.070 (2008); ARK. CODE ANN. § 6-13-611 (West 2004); CAL. EDUC. CODE § 5091 (West 2002 & Supp. 2009); FLA. STAT ANN. § 1001.38 (West 2004); IDAHO CODE § 33-504 (West 2006); MINN. STAT. ANN. § 123B.09 subdiv. 5 (West 2008); S.D. CODIFIED LAWS § 13-8-25 (2004); VT. STAT. ANN. tit. 16, § 424(a) (West 2007 & Supp. 2008).

47. ARIZ. REV. STAT. § 15-108 (Supp. 2008). Systemic educational mismanagement exists when it is determined "that the school district failed to ensure that a school or schools in the school district properly implemented their school improvement plan or plans." *Id.* § 15-108(M)(2); *see also* H.B. 2711, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

48. ARIZ. REV. STAT. ANN. § 15-108(A) (Supp. 2008). However, such a district *must* have at the very minimum, one school failing (not merely underperforming) to satisfy the state academic standards. *Id.* § 15-108(A)(2).

49. *Id.* § 15-103. A district is deemed insolvent when it "is unable to pay debts," employee salaries or tuition due to other school districts' or has defaulted on bond or interest payments for 60 calendar days, "contracted for any loan not authorized by law, . . . operated with a deficit equal to five per cent or more of the school district's revenue control limit for any fiscal year within the past two fiscal years," or failed to honor warrants for payment. *Id.* § 15-103(B); *see also* H.B. 2711, 48th Leg., 2d Reg. Sess. (Ariz. 2008). The state will find gross mismanagement when the "school district's officers or employees committed or engaged in gross incompetence or systemic and egregious mismanagement of the school district's finances or financial records." ARIZ. REV. STAT. ANN. § 15-103(V)(1) (Supp. 2008).

50. ARIZ. REV. STAT. ANN. § 15-103(Q); *see also* H.B. 2711, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

51. ARIZ. REV. STAT. ANN. § 15-103(F)(1) (Supp. 2008); *see also* H.B. 2711, 48th Leg., 2d

4. Arkansas.—Like the NCLB, Arkansas law dictates that districts not making AYP could face State takeovers.[53] The state law also authorizes takeover of districts in financial distress.[54] Arkansas requires election of school board members.[55]

5. California.—California also has a NCLB-like provision.[56] The same three corrective actions under the NCLB could provide the avenue for takeover of school districts in this state.[57] California may also take over districts in fiscal distress.[58] In the event of a takeover, the district's board remains in an advisory role.[59] California requires election of board members.[60]

6. Delaware.—In Delaware districts are evaluated on the basis of their academic performances using a five-point scale: "Superior Performance, Commendable Performance, Academic Review, Academic Progress and Academic Watch."[61] Those districts rated as Academic Review, Academic Progress or Academic Watch, are sanctioned pursuant to the NCLB.[62] Qualified voters elect board members in Delaware.[63]

Reg. Sess. (Ariz. 2008).

52. *See* ARIZ. REV. STAT. ANN. §§ 15-403, -421, -424 (2002 & Supp. 2008); ARIZ. REV. STAT. ANN. §§ 15-425, -426, -429, -431 (2002); *see also id.* §§ 15-428,-451.

53. ARK. CODE ANN. §§ 6-15-426(a)-(c) (West 2004 & Supp. 2009); *see also id.* §§ 6-15-403(1)-(2), -419, -428, -429.

54. *Id.* § 6-20-1909; *see also* ARK. CODE ANN. §§ 6-20-1901 to -1902 (West 2004); ARK. CODE ANN. §§ 6-20-1903 to -1906 (West 2004 & Supp. 2009); ARK. CODE ANN. § 6-20-1907 (West 2004); ARK. CODE ANN. §§ 6-20-1908 to -1910 (West 2004 & Supp. 2009); ARK. CODE ANN. § 6-20-1911 (West 2004).

55. *See* ARK. CODE ANN. §§ 6-13-604, -606 (West 2004 & Supp. 2009); ARK. CODE ANN. § 6-13-611 (West 2004); ARK. CODE ANN. §§ 6-13-615, 6-13-616(a), 6-13-631, 6-14-102, 6-14-121 (West 2004 & Supp. 2009).

56. CAL. EDUC. CODE § 52055.57(c) (West 2006 & Supp. 2009). This California education code section was enacted to implement the requirements of the NCLB. *Id.* § 52055.57(a)(1). California also has a law that allows takeover of a school district where its schools fail to meet the Academic Performance Index (API) growth targets. *Id.* § 52055.5(f). For more on the API, see section 52052, section 52052.1, section 52052.2, and section 52055.55 of the California Code.

57. *Compare* 20 U.S.C. § 6316(c)(1)(C)(iii), (v), (vi) (2006), *with* CAL. EDUC. CODE § 52055.57(c)(1)(A), (C), (D) (West 2006 & Supp. 2009).

58. CAL. EDUC. CODE §§ 41320, 41326 (West 1993 & Supp. 2009).

59. *Id.* § 41326(c)(1); *see also id.* § 41326(e)-(g) (listing specific conditions required for districts to emerge from the takeover).

60. *See* CAL. EDUC. CODE §§ 1007, 5000, 5016 (West 2002); CAL. EDUC. CODE § 5017 (West 2002 & Supp. 2009); CAL. EDUC. CODE § 5090 (West 2002); CAL. EDUC. CODE § 5091 (West 2002 & Supp. 2009); CAL. EDUC. CODE §§ 5092-5095, 5222 (West 2002) CAL. EDUC. CODE § 35012 (West 1993 & Supp. 2009); CAL. EDUC. CODE § 35103 (West 1993).

61. DEL. CODE ANN. tit. 14, § 155(a) (West 2006) (internal quotation marks omitted).

62. *Id.* § 155(d); *see also* 14-100-103 DEL. CODE REGS. § 7.0 (Weil 2009).

63. *See* DEL. CODE ANN. tit. 14, § 1051 (West 2006); DEL. CODE ANN. tit. 14, § 1052 (West

7. Florida.—In Florida, State takeovers might occur pursuant to the following provision: "notwithstanding any other statutory provisions to the contrary, the State Board of Education shall intervene *in the operation of a district school system* when one or more schools in the school district have failed to make adequate progress [toward state standards] for [two] school years in a [four]-year period."[64] Indeed, it is not even required that *all* schools in the district fail to make adequate progress in the two- or four-year period.[65] Florida law also provides for the election of school board members.[66]

8. Georgia.—While Georgia law does not explicitly provide for takeovers, the State might still be able to take over districts pursuant to the following provision: "The State Board of Education shall approve a single accountability system for local schools and school systems that incorporates federal law, rules, and regulations relating to accountability."[67] These federal laws include the NCLB and, with it, the NCLB's takeover sanction.[68] With respect to the election of board members, the Georgia Constitution provides that "[e]ach school system shall be under the management and control of a board of education, the members of which shall be elected as provided by law."[69]

9. Idaho.—Idaho also has a NCLB-like provision.[70] The state's administrative code dictates that the Idaho Department of Education take "mandatory corrective actions [for] local educational agencies as required under federal law"[71] where those districts fail to meet the AYP requirements of the NCLB.[72] Idaho's statutory law provides for election of board members.[73]

2006 & Supp. 2008); DEL. CODE ANN. tit. 14, § 1053 (West 2006); DEL. CODE ANN. tit. 14, § 1054 (West 2006 & Supp. 2008). In the case of consolidated districts, the state provides for initial appointment of board members but subsequently board members are elected. *Id.* § 1065(b). In this Article, the more pertinent and more interesting are the existing school boards, as takeovers of a newly consolidated district would be rare.

64. FLA. STAT ANN. § 1008.33(1) (West 2004 & Supp. 2009) (emphasis added).

65. *Id.*

66. *See* FLA. STAT. ANN. §§ 105.031, .035, .061 (West 2008); FLA. STAT. ANN. §§ 1001.34, .35, .361, .362, .363 (West 2004).

67. GA. CODE ANN. § 20-14-26(a)(1) (West 2007); *see also* GA. COMP. R. & REGS. 160-7-1-.01 to .04 (2008); GA. DEPT. OF EDUC., APP. F: TABLE OF LEA CONSEQUENCES, *available* at http://public.doe.k12.ga.us/DMGetDocument.aspx/FAQs%20-%20Consequences%20for%20NI%20Systems.pdf?p=6CC6799F8C1371F6A6272905BFB660C0817CDCAFA736D0E6F0E89008FE2FF5C3&Type=D.

68. GA. COMP. R. & REGS. 160-7-1-.04(3)(d)(2) (2008).

69. GA. CONST. art. 8, § 5, ¶ II; *accord* GA. CODE ANN. § 20-2-50 (West 2007).

70. IDAHO ADMIN. CODE r. 08.02.03.112 (2008); *id.* r. 08.02.03.114.02.

71. *Id.* r. 08.02.03.114.02.

72. *See id.* r. 08.02.03.112; *id.* r. 08.02.03.114.

73. *See* IDAHO CODE ANN. § 33-501 (West 2006 & Supp. 2008); IDAHO CODE ANN. §§ 33-502, -502A-502D, -503, -504 (West 2006); IDAHO CODE ANN. § 33-505 (West 2006 & Supp. 2008); IDAHO CODE ANN. §§ 33-506 to -507 (West 2006); IDAHO CODE ANN. § 33-402 (West 2006

10. Illinois.—Illinois has an NCLB-based law that provides authority for takeovers.[74] The State also permits takeovers of districts failing to emerge from academic watch status after three years.[75] Districts in fiscal distress can be taken over with the appointment of an oversight panel for the district.[76] Ostensibly, the elected board is not replaced.[77] The district must remain under State control for a minimum of three and maximum of ten years.[78] This provision for fiscal takeovers only applies to districts with less than 500,000 inhabitants.[79] Local boards may petition for the State to take them over.[80] Financial control of the district can subsequently be moved from the oversight panel to a School Finance Authority to enable the district's financial and educational recovery.[81]

Illinois also has a takeover provision that applies to cities with over 500,000 inhabitants.[82] The reality, however, is that this provision only applies to the Chicago Public Schools because it is the sole district that meets the population requirement.[83] The provision is designed to improve the graduation rates, academic performance and student attendance rates in the district.[84] Pursuant to this provision, the State dissolved the Chicago Board of Education and transferred power to the mayor to appoint a board of trustees.[85] The mayor does not even have to seek the city council's approval in making the appointment.[86] Illinois provides for election of board members.[87]

11. Iowa.—Iowa's school district accreditation provision also authorizes takeovers.[88] The accreditation committee's recommendations must "specify

---

& Supp. 2008); IDAHO CODE ANN. §§ 33-408, -419, -428 (West 2006).

74. 105 ILL. COMP. STAT. 5/2-3.25n(a) (West 2006); *see also id.* 5/2-3.25f(c) ("All federal requirements apply to schools and school districts utilizing federal funds under Title I, Part A of the [NCLB].").

75. *Id.* 5/2-3.25f(b)(1); *see also id.* 5/3-14.28.

76. *See id.* 5/1B.

77. *Id.* 5/1B-6, 5/1B-7, 5/1B-9. However, the panel might be able to remove the board as the state law gives the panel power "to do any and all things necessary or convenient to carry out its purposes and exercise the powers given to the [p]anel." *Id.* 5/1B-6(s); *see also* E. St. Louis Fed'n of Teachers v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel, 687 N.E.2d 1050, 1058 (Ill. 1997) (upholding statute and providing an example of the statute's operation).

78. 105 ILL. COMP. STAT. ANN. 5/1B-5 (West 2006).

79. *Id.* 5/1B-2(a)(3); *see also id.* 5/1B-3(e).

80. *Id.* 5/1B-4.

81. *See id.* 5/1E-5.

82. *Id.* 5/34-1, 5/34-1.01, 5/34-1.02, 5/34-1.1.

83. *See* statutes cited *supra* note 82; *see also infra* notes 623-24 and accompanying text.

84. 105 ILL. COMP. STAT. ANN. 5/34-1.01 to -1.02 (West 2006).

85. *Id.* 5/34-3, 5/34-3.3.

86. *Id.* 5/34-3(2).

87. *See, e.g., id.* 5/5-2, 5/6-3, 5/7-13; 105 ILL. COMP. STAT. 5/9-10 (West 2006 & Supp. 2008); 105 ILL. COMP. STAT. 5/10-1, 5/10-4, 5/10-10, 5/34-3.3 (West 2006).

88. IOWA CODE ANN.§ 256.11(10)-(12) (West 2003 & Supp. 2008).

whether the school district or school shall remain accredited or under what *conditions* the district may remain accredited."[89] One of those conditions confers the authority for State takeover of districts:

> The conditions may include, but are not limited to, providing temporary oversight authority, operational authority, or both oversight and operational authority to the director and the state board for some or all aspects of the school district operation, in order to bring the school district into compliance with minimum [accreditation] standards.[90]

If the district does not address its accreditation problems, the district can be placed in "receivership for the remainder of the school year."[91] The state provides for election of board members.[92]

12. Kansas.—Kansas' takeover provision, like Iowa's, is located within the State's accreditation laws. Districts with an unaccredited or a conditionally accredited school could face restructuring.[93] The state provides for election of school board members.[94]

13. Kentucky.—In Kentucky, before a takeover can occur, the state board of education must "believe[] that [there is] a critical lack of efficiency or effectiveness in the governance or administration of a local school district."[95] A hearing is then held to verify this belief.[96] If verified, "the state board shall assume sufficient supervision of the district to ensure that appropriate corrective action occurs."[97] If a hearing confirms a *pattern* of critical lack of efficiency or effectiveness to be addressed, the state board must "declare the district a 'state assisted district' or a 'state managed district'" and take over the district.[98] The state provides for election of board members.[99]

---

89. *Id.* § 256.11(12) (emphasis added).

90. *Id.*

91. *Id.*

92. *See id.* §§ 277.1 to .34, 275.12, 275.35, 275.41. It is important to point out that these statutory sections as well as section 256.11 are undergoing legislative action and Westlaw notes that the section's "[t]ext [is] subject to final changes by the Iowa Code Editor for Code 2009."

93. KAN. ADMIN. REGS. § 91-31-40(d) (2008). This restructure could provide the avenue for the State takeover of the district. *See id.* However, the Kansas Board of Education's recommendation of a restructure must be approved by the state legislature. *Id.* The district can appeal the recommendation within fifteen days after receiving the recommendation. *Id.* 91-31-37(c).

94. *See* KAN. STAT. ANN. §§ 72-7902, -8009, -7901 to -7905 (2002).

95. KY. REV. STAT. ANN. § 158.780(1)(b) (West 2006).

96. *Id.*

97. *Id.*

98. *Id.* § 158.780(1)(c); *see also id.* § 158.785; 703 KY. ADMIN. REGS. 3:205 (2008). As with the other states herein, districts can emerge out of takeover once the deficiencies that led to the takeover are corrected. KY. REV. STAT. ANN. § 158.785 (West 2006).

99. *See* KY CONST. §§ 152, 155; KY. REV. STAT. ANN. §§ 116.200, 160.042, 160.044,

14. Louisiana.—Under Louisiana's accountability system, the State could take over academically deficient districts failing to implement an improvement plan, new curriculum, replacement of school staff or other sanctions against the district.[100] Louisiana requires election of board members.[101]

15. Maryland.—Maryland has a NCLB-like provision.[102] The state may take over districts after a judicial hearing in which a trustee or receiver is appointed to manage the district[103] The state generally requires appointment of board members except in a few districts where election is required.[104]

16. Massachusetts.—Massachusetts's law permits the State to take over chronically underperforming districts by appointing a receiver for the district.[105] Although the state provides for the election of school board members, districts have the choice of appointing regional school district members "by locally *elected* officials such as school board members."[106]

17. Michigan.—In Michigan the State may assume control of districts in fiscal crisis.[107] Michigan law provides for election and appointment of regional

---

160.190, 160.200, 160.210, 160.220, 160.240 (West 2006).

100. LA. ADMIN CODE. tit. 28, §§ 1503, 1601, 1603, 4310, 4901, 4909, 4911 (2008); *see also id.* §§ 1609, 1901.

101. *See* LA. CONST. art. VIII, § 9(A); LA. REV. STAT. ANN. §§ 17:52, :52.1, :52.2 (2001); LA. REV. STAT. ANN. § 17:121 (2001 & Supp. 2009); *cf.* LA. REV. STAT. ANN. § 17:72.1 (2001) (providing for appointment of interim school board members in two parishes, which appointments, if at all, had to occur before 1999 and 2003).

102. MD. CODE REGS. 13A.01.04.08 (2008); *see also id.* 13A.01.04.09.

103. *Id.* 13A.01.04.08(B)(3)(f).

104. *See* MD. CODE ANN., EDUC. § 3-108(a) (West 2002 & Supp. 2008); *see also id.* § 3-108.1 (relating to Baltimore City Public Schools System); *id.* § 3-109 (relating to Baltimore County); *id.* § 3-110 (relating to Ann Arundel County). Election is required in the following counties: "(1) Allegany; (2) Calvert; (3) Carroll; (4) Cecil; (5) Charles; (6) Dorchester; (7) Frederick; (8) Garrett; (9) Howard; (10) Kent; (11) Prince George's; (12) Montgomery; (13) Queen Anne's; (14) St. Mary's; (15) Somerset; (16) Talbot; (17) Washington; and (18) Worcester." *Id.* § 3-114; *see also id.* §§ 3-201 to -1401 (outlining election requirements for various counties).

105. MASS. GEN. LAWS ANN. ch. 69, § 1K (West 1996); 603 MASS. CODE REGS. 2.04 (2008). A chronically underperforming district is "a school district [that] has consistently failed to improve the performance of students attending school in the district." MASS. GEN. LAWS ANN. ch. 69, § 1K (West 1996); 603 MASS. CODE REGS. 2.04(5) (2008); *see also* MASS. GEN. LAWS ANN. ch. 69, § 1B (West 1996 & Supp. 2008); MASS. GEN. LAWS ANN. ch. 69, § 1J (West 1996); 603 MASS. CODE REGS. 2.01-2.03 (2008).

106. MASS. GEN. LAWS ANN. ch. 71, § 14E (West 1996) (emphasis added); *see also* MASS. GEN. LAWS ANN. ch. 41, § 1 (West 2004); *id.* ch. 41, § 1B; *id.* ch. 41, § 9; MASS. GEN. LAWS ANN. ch. 43, § 31 (West 1994); *id.* ch. 43, § 36; *id.* ch. 43, § 102; *id.* ch. 43, § 109; MASS. GEN. LAWS ANN. ch. 54, § 162 (West 2007); MASS. GEN. LAWS ANN. ch. 71, § 16A (West 1996 & Supp. 2008); CHELSEA SCHOOL COMM., RULES AND REGULATIONS, *available at* http://www.chelseaschools.com/school_committee/RULESA~1.PDF.

107. MICH. COMP. LAWS ANN. §§ 141.1231 to .1291 (West 2005); *see also* MICH. COMP. LAWS

school district committee members.[108]

18. Minnesota.—Minnesota's law implementing the NCLB potentially authorizes State takeover of districts.[109] Similar to the NCLB, Minnesota's law does not contain any precise provision for State takeover; however, the following language might provide the necessary authority: "The [Minnesota] Department of Education shall continue to implement the federal [NCLB] . . . without interruption."[110] This language suggests that the State has the power to wholly implement the NCLB and therefore has the power to take over those districts failing to meet AYP.[111] The state law also provides for election and appointment of board members.[112]

19. Mississippi.—Mississippi's accreditation law gives the State authority to take over districts.[113] The process starts with the governor's declaration of a state of emergency.[114] Following such a declaration, the State Board of Education may appoint an interim conservator.[115] Alternatively, the State Board could itself manage the district.[116] State law provides for both election and

---

ANN. § 388.994 (West 2004).

108. *See* MICH. COMP. LAWS ANN. § 168.301 to .316 (West 2008); MICH. COMP. LAWS ANN. §§ 380.11a(7)-(10) (West 2005 & Supp. 2008); MICH. COMP. LAWS ANN. 380.611 (West 2005); *id.* § 380.703(7); DETROIT BD. OF EDUC., FAQS ABOUT THE DETROIT BOARD OF EDUCATION, *available at* http://www.detroit.k12.mi.us/board/documents/FAQsDBOE.pdf. In the case of consolidated districts, the state provides for initial appointment of board members but subsequently board members are to be elected. MICH. COMP. LAWS ANN. § 380.861 (West 2005).

109. MINN. STAT. ANN. § 127A.095 (West 2008).

110. *Id.* subdiv. 1.

111. *See id.* The same law requires the department to ask the federal government for various waivers from the NCLB. *Id.* subdiv. 2(b) (listing the waivers). In fact, the law adds that if the department is not able to obtain the waivers listed in the statute, then the department should advise "whether the state should opt out of the No Child Left Behind Act." *Id.* subdiv. 2(a). Corrective action or state takeover is not one of the waivers the department is expressly ordered to seek. *See id.* subdiv. 2(b). Instead, the statute allows corrective action and a state takeover to be imposed pursuant to the NCLB. *See generally id.* § 127A.095.

112. *See* MINN. STAT. ANN. §§ 123A.48, 123A.58, 123A.68, 123B.09 (West 2008); MINN. STAT. ANN. §§ 205A.01 to .11 (West 1992 & Supp. 2009); *see also* MINN. STAT. ANN. §§ 120A.05, 123A.55, 123B.50, 123B.94, 128.01, 128.02, 128D.08 (West 2008); MINN. STAT. ANN. § 205A.03 (West 1992 & Supp. 2009); MINN. STAT. ANN. § 383B.041 (West 2004). For a provision for the appointment of joint boards for Intermediate School District Number 287, Hennepin and Wright Counties, see sections 136D.22 and 136D.24 of the Minnesota Code. *See also* MINN. STAT. ANN. § 136D.01 (West 2008) (defining an intermediate school district); *id.* §§ 136D.71, .76, .82, .84.

113. MISS. CODE ANN. § 37-17-6 (West 1999 & Supp. 2008).

114. *Id.* § 37-17-6(11).

115. *Id.* § 37-17-6(11)(c)(iii); *see* § 37-17-6(11)-(15) (allowing for appointment of an interim conservator if a majority of the membership of a school board of any district resigns).

116. *Id.* § 37-17-6(11)(c)(ii).

appointment of school boards.[117]

20. Missouri.—Missouri law provides for the corporate organization of a district to lapse if the district fails to have the minimum academic term required under state law or the district remains unaccredrited for two consecutive years.[118] Once the district lapses, the State may appoint an administrative board to manage the district.[119] Missouri's law also specifically provides authorization for the appointment of an administrative board to run "a metropolitan school district or an urban school district containing most or all of a city with a population greater than [350,000] inhabitants and in any other school district if the local board of education does not anticipate a return to accredited status."[120] The statute provides for election of board members.[121]

21. Nevada.—Nevada has a NCLB-like provision for takeovers.[122] The State also allows corrective action, including the takeovers provided in the NCLB, "against a school district that is designated as demonstrating need for improvement, including, without limitation, a school district that is not a Title I school district."[123] Nevada provides for election of board members.[124]

22. New Jersey.—New Jersey evaluates districts using "the New Jersey Quality Single Accountability Continuum."[125] In addition to considering thoroughness and efficiency, the evaluation continuum also considers "district capacity" in "five key components of school district effectiveness."[126] The five components are: (1) governance; (2) personnel; (3) financial management; (4) operations; and (5) instruction and programing.[127] The state commissioner of

---

117. *See* MISS. CODE ANN. § 37-5-1 (West 1999 & Supp. 2008); MISS. CODE ANN. §§ 37-5-3 to -9 (West 1999); MISS. CODE ANN. § 37-5-18 (West 1999 & Supp. 2008); MISS. CODE ANN. §§ 35-5-19, 37-6-7 (West 1999); MISS. CODE ANN. § 37-18-7(5) (West Supp. 2008). Pursuant to the governor's declaration of a state of emergency and through the same avenues for takeover as described above, the State could take over a district with "a school [that] continues to be designated a School At-Risk after three (3) years of implementing a school improvement plan, or in the event that more than fifty percent (50%) of the schools within the school district are designated as Schools At-Risk in any one (1) year." *Id.* § 37-18-7(6).

118. MO. ANN. STAT. § 162.081(1) (West 2000 & Supp. 2008).

119. *Id.* § 162.081(4).

120. *Id.* § 162.081(3).

121. *See* MO. ANN. STAT. § 115.125 (West 1997 & Supp. 2009); MO. ANN. STAT. § 162.211 (West 2000 & Supp. 2008); MO. ANN. STAT. § 162.241 (West 2000); MO. ANN. STAT. §§ 162.261, .301, .459, .471 (West 2000 & Supp. 2008); MO. ANN. STAT. §§ 162.491, .581 (West 2000); MO. ANN. STAT. § 162.601 (West 2000 & Supp. 2008).

122. NEV. REV. STAT. ANN. §§ 385.3772(4), .3773 (West 2006); *see also* 20 U.S.C. § 6316(c)(10)(C) (2006); NEV. REV. STAT. § 385.3774 (West 2006).

123. NEV. REV. STAT. ANN. ANN. § 385.3772(3) (West 2006).

124. *See id.* §§ 386.120, .160, .165, .180, .190, .200, .205, .215, .225, .240, .260, .270, .300.

125. N.J. STAT. ANN. § 18A:7A-10 (West 1999 & Supp. 2008).

126. *Id.*

127. *Id.* The law requires that effectiveness and capacity be assessed by:

education must conduct a study of district performance and capacity for those districts meeting "less than 50[%] of the quality performance indicators in four or fewer of the five key components of school district effectiveness."[128] Based on this evaluation, such districts must create an improvement plan to address their insufficiencies on the quality performance indicators.[129] The State may assume partial control of those districts that fail to satisfy at least 50% of the performance indicators in four or fewer key components.[130] Districts meeting "less than 50[%] of the quality performance indicators in *each* of the *five* key components of school district effectiveness"[131] could face total State takeover.[132] The state provides for appointment and election of board members.[133]

23. New Mexico.—New Mexico authorizes takeovers of "district[s] that [have] failed to meet requirements of law or [state public education] department rules or standards."[134] District noncompliance with state financial requirements could also catalyze a State takeover.[135] New Mexico provides for the election

---

> [Q]uality performance indicators comprised of standards for each of the five key components of school district effectiveness. The quality performance indicators shall take into consideration a school district's performance over time, to the extent feasible. Based on a district's compliance with the indicators, the [state] commissioner [of education] shall assess district capacity and effectiveness and place the district on a performance continuum.

Id. The commissioner must create a way for parents and community members to provide input in assessing the district. *Id.* § 18A:7A-14(a).

128. *Id.* § 18A:7A-14(c)(1); *see also* § 18A:7A-14(e)(1) (requiring the same evaluation for district meeting "less than 50[%] of the quality performance indicators in *each* of the *five* key components of school district effectiveness") (emphasis added).

129. *Id.* § 18A:7A-14(c)(1), -14(e)(1).

130. *Id.* § 18A:7A-14(c)(3); *see also id.* § 18A:7A-14(e)(1).

131. *Id.* § 18A:7A-14(e)(1) (emphasis added).

132. *Id.* ("Nothing in this paragraph shall be construed to prohibit the State board [of education] from directing the district to enter full State intervention prior to the expiration of the two-year period.").

133. *See* N.J. STAT. ANN. §§ 18A:8-18, :9-10, :12-1, :12-7, :12-11, :12-15, :13-8 (West 1999); N.J. STAT. ANN. § 19:60-7 (West 1999 & Supp. 2008); N.J. STAT. ANN. § 52:27BBB-63 (West Supp. 2008).

134. N.M. STAT. ANN. § 22-2-2(C) (West Supp. 2008).

135. N.M. STAT. ANN. § 22-2-14(A)-(F) (West 2003 & Supp. 2008). Specifically, the law requires that "[m]oney budgeted by a school district shall be spent first to attain and maintain the requirements for a school district as prescribed by law and by standards and rules as prescribed by the [state] department [of education]." *Id.* § 22-2-14(A); *see* N.M. CODE R. §§ 6.30.6.1 to .13 (Weil 2009). Districts failing to meet these requirements must be so notified. N.M. SAT. ANN. § 22-2-14(A) (West 2003 & Supp. 2008); N.M. CODE R. § 6.30.6.9(A) (Weil 2009). "Instructional units or administrative functions [within such districts] may be disapproved for such deficiencies." N.M. STAT. ANN. § 22-2-14(A) (West 2003 & Supp. 2008).

and appointment of board members.[136]

24. New York.—New York State law authorizes the New York City School Chancellor[137] to "[i]ntervene in any districts or school which is persistently failing to achieve educational results and standards approved by the city board [of education]."[138] State law also empowers the Chancellor to intervene in districts that have "failed to improve [their] educational results and student achievement in accordance with such standards or state or city board requirements, or in any school or district in which there exists, in the chancellor's judgment, a state of uncontrolled or unaddressed violence."[139] Failure of the district to implement an improvement plan could lead the Chancellor to "assume joint or direct control of the operation of the . . . district to implement the corrective action plan."[140] The state also has a NCLB-like provision that would allow State takeovers.[141] The state provides for the election and appointment of board members.[142]

25. North Carolina.—In North Carolina if over 50% of schools in a district are low-performing,[143] the State could appoint an interim superintendent in place

---

136. *See, e.g.*, N.M. CONST. art. XII, § 15; N.M. STAT. ANN. § 1-22-3 (West 2003); N.M. STAT. ANN. § 1-22-4 (West 2003 & Supp. 2008); N.M. STAT. ANN. §§ 1-22-5 to -19, 22-4-13, 22-4-14, 22-5-1, 22-5-1.1. In the case of consolidated districts, the state provides for initial appointment of board members but the subsequent election of board members. *Id.* § 22-4-10 to -12.

137. *See* N.Y. EDUC. LAW § 2590-h (McKinney 2007 & Supp. 2009) (describing the powers and duties of the New York City School Chancellor). Until June 30, 2009, the City School Chancellor is appointed by the mayor of New York City. *Id.* ("Such chancellor shall serve at the pleasure of and be employed by the mayor of the city of New York by contract. The length of such contract shall not exceed by more than two years the term of office of the mayor authorizing such contract."). Effective June 30, 2009, the Chancellor shall be appointed "by the city board by contract for a term not to exceed by more than one year the term of office of the city board authorizing such contract, subject to removal for cause." *Id.*

138. *Id.* § 2590-h(31).

139. *Id.*

140. *Id.* Effective June 30, 2009, the chancellor takes over the power of the community district education councils, the community district education councils are referred to as community boards in the state law. *See* N.Y. EDUC. LAW § 2590-c (McKinney 2007); N.Y. EDUC. LAW § 2590-h(9), (11), (13) (McKinney 2007 & Supp. 2009); *see also id.* §§ 2554(2), 2590-h(17).

141. N.Y. COMP. CODES R. & REGS. tit. 8, §§ 100.2(p), 120.2 (2008).

142. *See* N.Y. EDUC. LAW §§ 2553, 2590-c (McKinney 2007) (providing for elections and appointments until June 30, 2009); *see also id.* §§ 1607, 1702; N.Y. EDUC. LAW §§ 1709(17), 1804 (McKinney 2007 & Supp. 2009); N.Y. EDUC. LAW §§ 1901, 1914, 2018-a, 2113, 2502, 2510, 2552, 2564 (McKinney 2007).

143. N.C. GEN. STAT. ANN. § 115C-105.37(a) (West 2000 & Supp. 2008) ("Low-performing schools are those in which there is a failure to meet the minimum growth standards, as defined by the State Board, and a majority of students are performing below grade level."); *see also* N.C. GEN. STAT. ANN. § 115C-105.37A (West Supp. 2008) (defining "continually low-performing" schools).

of the incumbent superintendent.[144] If the State finds that the board is not cooperating with the interim superintendent or has hampered student achievement, then the State Board of Education may suspend the powers of the local school board.[145] Beyond such a suspension, if the State determines that it is necessary to change the district's governance to improve student achievement, then the State Board of Education could present such a governance change to the State Legislature for consideration.[146] The state provides for appointment and election of school board members.[147]

26. Ohio.—Ohio has a NCLB-like provision[148] requiring at least one corrective action in districts "identified for improvement for three consecutive school years."[149] The sole corrective action authorizing a takeover, however, is the appointment of a trustee to run the district.[150] The state provides for appointment and election of school board members.[151]

27. Oklahoma.—Oklahoma law requires the State Board of Education to create an accountability system under the NCLB.[152] While the law does not specifically provide for State takeovers,[153] the broad authority the statute confers on the State to implement the NCLB ostensibly necessarily includes such a power.[154] The state provides for election and appointment of board members.[155]

---

144. N.C. GEN. STAT. ANN. § 115C-105.39(c)(1) (West 2000); *see generally* N.C. GEN. STAT. ANN. § 115C-12 (West 2000 & Supp. 2008) (outlining the power of the North Carolina Board of Education).

145. N.C. GEN. STAT. ANN. § 115C-105.39(d) (West 2000).

146. *Id.* § 115C-105.39(e). Presumably, this is the same procedure the state must follow in order to replace an elective governance structure with an appointive one.

147. *See, e.g., id.* §§ 115C-35 to -37.1.

148. OHIO REV. CODE ANN. § 3302.04(F) (West 2005); *see also id.* §§ 3302.01 to .02; OHIO REV. CODE ANN. §§ 3302.21 to .03 (West 2005 & Supp. 2008); OHIO REV. CODE ANN. § 3302.031 (West 2005); OHIO REV. CODE ANN. § 3302.032 (West Supp. 2008); OHIO REV. CODE ANN. §§ 3302.04 to .09 (West 2005); OHIO REV. CODE ANN. § 3302.10 (West 2005 & Supp. 2008).

149. OHIO REV. CODE ANN. § 3302.04(F)(3) (West 2005). Recall, the NCLB requires that districts failing to make AYP for two consecutive years be identified for improvement. 20 U.S.C. § 6316(c)(3) (2006). The other corrective actions under the Ohio law are: establishing (i) alternate governance for individual schools in the district, OHIO REV. CODE ANN. § 3302.04(F)(3)(d) (West 2005); (ii) implementation of a new curriculum, *id.* § 3302.04(F)(3)(c); (iii) withholding part of district's Title I funds, *id.* § 3302.04(F)(3)(a); and (iv) ordering the *district* to replace key personnel, *id.* § 3302.04(F)(3)(b). Ordering the district to replace the personnel is less suggestive of a takeover. *Cf.* 20 U.S.C. § 6316(c)(10)(C)(iii).

150. OHIO REV. CODE ANN. § 3302.04(F)(3)(e) (West 2005).

151. *See id.* §§ 3311.71, 3313.01 to .13; OHIO REV. CODE ANN. §§ 3313.12 to .13 (West 2005 & Supp. 2008); OHIO REV. CODE ANN. § 3313.47 (West 2005); OHIO REV. CODE ANN. § 3513.254 (West 2007); *see also* OHIO CONST. art. VI, § 3.

152. OKLA. STAT. ANN. tit. 70, § 1210.541(B) (West 2005).

153. *See id.*; *see also* OKLA. ADMIN. CODE § 210:10-13-18 (2008).

154. Oklahoma also potentially allows takeover through what the law describes as "full state

28. Pennsylvania.—Pennsylvania law authorizes the State to take over fiscally distressed districts.[156] Prior to the takeover, the State must petition a court to appoint two people to serve on a "special board of control" along with the State Secretary of Education or her designee.[157] The State can also take over districts placed on an education empowerment list by the Secretary.[158] If, after a tenure of three years on the list, the district does not meet the goals set forth in the district improvement plan and the district remains academically deficient, the State appoints a board of control to manage the district.[159] The state provides for appointment and election of board members.[160]

---

intervention" in elementary school districts that do not "meet financial requirements for school districts or accreditation standards which negatively affects education or could result in the elementary school district not being able to operate for the remainder of the year." OKLA. STAT. ANN. tit. 70, § 1210.543(A) (West Supp. 2009). In such cases, the state board has the option of "issu[ing] an administrative order placing the elementary school district under full state intervention." *Id.* Elementary districts are those that have "grades kindergarten through eight and . . . have not met the minimum standards for, and have not been designated as, independent school districts by the State Board of Education." OKLA STAT. ANN. tit. 70, § 5-103 (West 2005). A further examination of the Oklahoma provision allowing full intervention reveals a list of interventions, only one of which is a takeover. OKLA. STAT. ANN. tit. 70, § 1210.543(B) (West Supp. 2009).

155. *See* OKLA. STAT. ANN. tit. 26, §§ 13A-101 to -111 (West 1997 & Supp. 2009); OKLA. STAT. ANN. tit. 70, §§ 5-107A to -107B (West 2005); OKLA. STAT. ANN. tit. 70, §§ 5-110 to -.1 (West 2005 & Supp. 2009); OKLA STAT. ANN. tit. 70 §§ 14-110, 4419 (West 2005); OKLA. ADMIN. CODE 780:15-3-3 (2008); *id.* 780:15-3-5. In the case of consolidated districts, the state provides for initial appointment of board members but subsequently board members are to be elected. OKLA. STAT. ANN. tit. 70, § 7-101(C)(5)-(6) (West 2005); *id.*§ 7-105.

156. 24 PA. CONS. STAT. ANN. § 6-692 (West 1992 & Supp. 2008); 24 PA. CONS. STAT. ANN. § 6-693 (West 1992). The State Secretary of Education could declare a district financially-distressed for various enumerated reasons, such as the district's non-payment of teacher or other employee salaries for ninety days, PA. CONS. STAT. ANN. § 6-691(a)(1) (West 1992 & Supp. 2008); nonpayment of tuition owed another district, *id.* § 6-691(a)(2); default on bonds for ninety days, *id.* § 6-691(a)(4); and contracting for loans unauthorized by law, *id.* § 6-691(a)(5).

157. *Id.* § 6-692.

158. 24 PA. CONS. STAT. ANN. §§ 17-1703-B, -1714.1-B (West Supp. 2008). Districts having academic problems tend to be the ones placed on the list. Districts on the empowerment list or those certified as empowerment districts can emerge out of State takeover when the history of low test performance stops and improvement plan goals are satisfied. *Id.* § 17-1710-B; *see also id.* § 17-1714.1-B. The Education Empowerment Act will expire June 30, 2010. *Id.* § 17-1716-B.

159. *Id.* §§ 17-1703-B to -1707-B.

160. *See* 24 PA. CONS. STAT. ANN. §§ 3-301 to -323 (West 1992); 24 PA. CONS. STAT. ANN. 3-24 (West 1992 & Supp. 2008); 24 PA. CONS. STAT. ANN. §§ 3-325 to -327 (West 1992); 24 PA. CONS. STAT. ANN. § 6-692 (West 1992 & Supp. 2008); 24 PA. CONS. STAT. ANN. § 6-692.1 (West 1992); 24 PA. CONS. STAT. ANN. § 6-696 (West 1992 & Supp. 2008); 24 PA. CONS. STAT. ANN. §17-1707-B (West Supp. 2008).

29. Rhode Island.—For districts that are academically deficient following three years of state assistance, Rhode Island law provides the State with "progressive levels of control"[161] over the "district budget, program, and/or personnel. This control by the department of elementary and secondary education *may* be exercised in collaboration with the school district and the municipality."[162] This apparent partial State takeover does not necessarily replace the elected board.[163] However, the language suggests that the State could exercise the control without collaboration with the district, in which case the local board might become essentially a lame-duck board.[164] Rhode Island provides for election of board members.[165]

30. South Carolina.—For at-risk districts in South Carolina where student performance fails to improve or where the district fails to implement adequately the State Board of Education's recommendations in the prescribed time, the State Superintendent, with the State Board's approval, may "declare a state of emergency in the school district and assume management of the school district."[166] The local school board is not replaced in such takeovers.[167] Instead, the law provides that the district school board changes the composition of the board.[168] Importantly, though, the district may only appoint new members included on a list of candidates provided by the State.[169] Moreover, the appointed members are nonvoting members.[170] South Carolina law provides for election and appointment of board members.[171]

31. South Dakota.—South Dakota's takeover provision is similar to the NCLB's.[172] The state provides for election of board members.[173]

---

161. R.I. GEN. LAWS ANN. § 16-7.1-5(a) (West 2006 & Supp. 2008).

162. *Id.* (emphasis added).

163. *See id.* (note the permissive language).

164. *See id.* Even after State takeover, the school board still seems to have control over some aspects of school funding. Rhode Island also allows a school board in financial difficulties, due to inadequate taxable property and an insufficient apportionment from the general treasury to support high quality schools, to request the State takeover the district's schools. R.I. GEN. LAWS ANN. § 16-1-10(a) (West 2006); R.I. GEN. LAWS ANN. § 16-60-4 (West 2006 & Supp. 2008).

165. *See* R.I. GEN. LAWS ANN. §§ 16-2-5, 17-19-7.1 (West 2006).

166. S.C. CODE ANN. § 59-18-1570(B)(4) (West 2004 & Supp. 2008), as amended by H.B. 4662, 2008 Leg., 117th Sess. (S.C. 2008).

167. S.C. CODE ANN. § 59-18-1570(C) (West 2004 & Supp. 2008).

168. *Id.*

169. *Id.*

170. *Id.*

171. In South Carolina, state law largely provides for appointment of the board members. *See* S.C. CODE ANN. § 59-15-10 (West 2004); S.C. CODE ANN. § 59-18-1570(C) (West 2004 & Supp. 2008); S.C. CODE ANN. §§ 59-19-20, -30, -40, -45, -50, -60 (West 2004).

172. *See* S.D. ADMIN. R. 24:42:03:20 (2008); *see also* S.D. CODIFIED LAWS § 13-3-67 (2004); S.D. ADMIN. R. 24:42:03:01, :28 (2008); *see generally id.* R. 24:42:02:01, :21. The state's statute gives the state board of education authority to create a system of accountability that includes

32. Tennessee.—In Tennessee, takeovers might occur under the appellation "LEA [local educational agency] Restructuring 1"[174] or the appellation "LEA Restructuring 2."[175] "If the LEA does not meet the performance standards of the state board by the end of the third year of improvement status, it may be placed in the fourth year of improvement status (LEA Restructuring 1)."[176] There are arguably two provisions in this LEA Restructuring 1 phase that might give the State the authority to take over a school district: (1) "[r]eplace[ment] [of] the LEA personnel who are relevant to the failure to make [AYP]"[177]; or (2) "[r]eorganiz[ation] of the internal management structure."[178]

In LEA Restructuring 2, during the fifth year of a district in improvement status, two other provisions might give the State authority to take over a district.[179] The law states that "[i]f the LEA does not meet the performance standards of the state board by the end of the fourth year in improvement status, it may be placed in the fifth year of improvement status (LEA Restructuring 2—Alternative Governance)."[180] In this phase, the State Commissioner of Education could either "[a]ssume any or all powers of governance for the LEA"[181] or "[r]ecommend to the state board that some or all of the local board of education members be replaced."[182] Tennessee provides for election of board members.[183]

---

sanctions for school districts, S.D. CODIFIED LAWS §§ 13-3-67, -69(8) (2004), and to promulgate any other rule to help implement the NCLB, *id.* § 13-3-69(13). *See also id.* §§ 13-3-62, -68. Pursuant to this authority, the state administrative rules created this accountability system which is an implementation of the NCLB. S.D. ADMIN. R. 24:42:03:01 to :28 (2008). Before a district is identified for corrective action, the district is entitled to examine the data used for the identification. *Id.* R. 24:42:03:04 to :06.

173. *See* S.D. CODIFIED LAWS §§ 13-5-2, 13-6-13.1, 13-6-62 to -64 (2004); S.D. CODIFIED LAWS §§ 13-7-6 to -6.1 (2004 & Supp. 2008); S.D. CODIFIED LAWS §§ 13-7-7 to -10.2 (2004); S.D. CODIFIED LAWS §§ 13-7-10.3 to -10.4 (2004 & Supp. 2008); S.D. CODIFIED LAWS §§ 13-7-11 to -12 (2004); S.D. CODIFIED LAWS § 13-7-13 (2004 & Supp. 2008); S.D. CODIFIED LAWS §§ 13-7-14 to -27 (2004); S.D. CODIFIED LAWS § 13-8-7.1 (2004 & Supp. 2008); S.D. CODIFIED LAWS §§ 13-8-24 to -25 (2004); S.D. ADMIN. R. 5:02:04:15, 5:02:06:15, 5:02:06:16, 5:02:08:11, 5:02:15:10 to -:11 (2008).

174. TENN. CODE ANN. § 49-1-602(k) (West 2006 & Supp. 2009). LEA is a reference to the school district. TENN. CODE ANN. § 49-1-103(2) (West 2006).

175. TENN. CODE ANN. § 49-1-602(1) (West 2006 & Supp. 2009).

176. *Id.* § 49-1-602(k).

177. *Id.* § 49-1-602(k)(2)(A).

178. *Id.* § 49-1-602(k)(2)(D).

179. *See id.* § 49-1-602(*l*).

180. *Id.*

181. *Id.* § 49-1-602(*l*)(1)(A).

182. *Id.* § 49-1-602(*l*)(1)(C).

183. *See* TENN. CODE ANN. § 6-53-110 (West 2002 & Supp. 2009); TENN. CODE ANN. § 7-1-112 (West 2007); TENN. CODE ANN. §§ 49-1-602(*l*)(3), 49-2-201 (West 2006 & Supp. 2009);

33. Texas.—In Texas,[184] the State could, among other sanctions,[185] take over districts that fail to meet the state standards for academic performance,[186] accreditation,[187] or financial accountability.[188] The key provisions in the Texas law that might provide the means for a takeover give the State Commissioner of Education authority to do any of the following: (1) "appoint a conservator to oversee the operations of the district"[189]; (2) "appoint a management team to direct the operations of the district in areas of unacceptable performance"[190]; and (3) "if a district has a current accreditation status of accredited-warned or accredited-probation, is rated academically unacceptable, or fails to satisfy financial accountability standards as determined by commissioner rule, appoint a board of managers to exercise the powers and duties of the board of trustees."[191] The first two provisions are suggestive of partial takeovers[192] and a district might not be able to complete a total takeover under those provisions.[193] Indeed, the first suggests more of an oversight/supervisory role,[194] whereas the second indicates a takeover limited to "areas of unacceptable performance."[195] The third

---

TENN. CODE ANN. § 49-2-201 (West 2006 & Supp. 2008); TENN. CODE ANN. §§ 49-2-202, -1205, -1254(c)(8) (West 2006).

184. *See* TEX. EDUC. CODE ANN. § 39.131 (Vernon 2006 & Supp. 2008) (spelling out Texas's takeover requirements); *see also* TEX. EDUC. CODE ANN. § 39.133 (Vernon 2006); 19 TEX. ADMIN. CODE §§ 97.1035, .1051 to .1073 (2008).

185. For the other sanctions in the law, see TEX. EDUC. CODE ANN. § 39.131(a) (Vernon 2006 & Supp. 2008).

186. *See id.* § 39.072 (setting forth the academic performance standards); *see also id.* § 39.131.

187. *See id.* § 39.071 (setting forth Texas's accreditation requirements); *see also id.* § 39.131.

188. The financial accountability standards are set by the state commissioner of education. *Id.* § 39.131(a).

189. *Id.* § 39.131(a)(7).

190. *Id.* § 39.131(a)(8).

191. *Id.* § 39.131(a)(9); *see also* § 39.136(a). Further, "[i]f the commissioner appoints a board of managers to govern a district, the powers of the board of trustees of the district are suspended for the period of the appointment." TEX. EDUC. CODE ANN. § 39.136(b) (Vernon 2006).

192. *See id.* § 39.135(c)(3)-(6). Also in Texas, "[i]f the commissioner appoints a board of managers to govern a campus, the powers of the board of trustees of the district *in relation to* the campus are suspended for the period of the appointment." *Id.* § 39.136(c) (emphasis added).

193. For example, the state law in defining powers of the conservator or management team points out that neither the conservator nor the management team can, inter alia, "take any action concerning a district election, including ordering or canceling an election or altering the date of or the polling places for an election," *id.* § 39.135(c)(3), or "change the number of or method of selecting the board of trustees." *Id.* § 39.135(c)(4).

194. *See id.* § 39.131(a)(7). This shows that the powers of the conservator and management team are limited. At the same time, the law gives the conservator and management team power to direct as well as approve or disapprove actions of the school board. *Id.* § 39.135(c)(1)-(2).

195. *See id.* § 39.131(a)(8).

provision is the most pellucid on State takeover.[196] The state provides for appointment and election of board members.[197]

34. West Virginia.—West Virginia's accountability system for districts[198] requires that the board of education rate districts annually based on performance audits using four different levels: nonapproval, conditional approval, temporary approval, or full approval.[199] The pertinent rating for State takeovers is the nonapproval rating.[200] The law provides that

> [n]onapproval status shall be given to a county board which fails to submit and gain approval for its electronic county strategic improvement plan or revised electronic county strategic improvement plan within a reasonable time period as defined by the state board or which fails to meet the objectives and time line of its revised electronic county strategic improvement plan or fails to achieve full approval by the date specified in the revised plan.[201]

When the state board assigns a district nonapproval status, the board must "declare a state of emergency."[202] The district then has six months to address the

---

196. *See id.* § 39.131(a)(9). This is evident in the fact that in another subsection, the law states that irrespective of a district's compliance with accreditation standards, "[i]f for a period of one year or more a district has had a conservator or management team assigned, the commissioner may appoint a board of managers, a majority of whom must be residents of the district, to exercise the powers and duties of the board of trustees." *Id.* § 39.131(b).

197. *Id.* §§ 11.052, 11.057; *id.* § 11.351 (describing special-purpose districts); *id.* § 11.352 (appointments for special-purpose districts); *id.* § 39.136(e); TEX. ELEC. CODE ANN. § 41.001 (Vernon 2003 & Supp. 2008); TEX. ELEC. CODE ANN. §§ 41.0011 to .005 (Vernon 2003); TEX. ELEC. CODE ANN. §§ 41.0051 to -.0052 (Vernon 2003 & Supp. 2008); TEX. ELEC. CODE ANN. §§ 41.0053 to .006 (Vernon 2003); TEX. ELEC. CODE ANN. § 41.007 (Vernon 2003 & Supp. 2008); TEX. ELEC. CODE ANN. § 41.008 to .031 (Vernon 2003); TEX. REV. CIV. STAT. ANN. art. 2688k §§ 1-2 (Vernon 1965 & Supp. 2008).

198. W. VA. CODE R. §§ 126-13-1 to -19 (2008); *see also* W. VA. CODE ANN. §§ 18-1-4, -18-2E-5(p) (West 2002 & Supp. 2008). The state law suggests that this accountability system is an attempt to implement the NCLB. *See* W. VA. CODE R. § 126-13-1.2 (2008) (identifying the NCLB as authority for the state law). However, this state law has no real semblance to the NCLB provisions, including the NCLB's corrective actions. *See generally* W. VA. CODE ANN. § 18-2E-5 (West 2002 & Supp. 2008); W. VA. CODE R. §§ 126-13-1 to -19 (2008).

199. W. VA. CODE ANN. § 18-2E-5(p) (West 2002 & Supp. 2008); W. VA. CODE R. § 126-13-14.1 (2008); *see also* W. VA. CODE ANN. § 18-2E-5 (West 2002 & Supp. 2008).

200. *See* W. VA. CODE ANN. § 18-2E-5(p)(4)(C) (West 2002 & Supp. 2008); W. VA. CODE R. § 126-13-15 (2008).

201. W. VA. CODE § 18-2E-5(p)(4) (West 2002 & Supp. 2008); W. VA. CODE R. §§ 126-13-14.5, -15.1 to -15.4 (2008). The state board defined "reasonable time period" as "30 days following written notification of the temporary approval status." *Id.* § 126-13-15.2.

202. W. VA. CODE ANN. § 18-2E-5(p)(4)(C) (West 2002 & Supp. 2008); W. VA. CODE R. § 126-13-15.6.1 (2008).

emergency or face at least a partial takeover.[203] The State is not required to give the district the full six-month period before it intervenes.[204] The state provides for election of board members.[205]

35. Wyoming.—Wyoming has a NCLB-like provision.[206] The state provides for appointment and election of school board members.[207]

With this panorama of State takeover provisions, we examine diverse takeovers to highlight implementation of takeovers across the nation.

II. THE RACIAL PHYSIOGNOMY OF STATE TAKEOVERS

Having surveyed the takeover provisions in thirty-five states, it is necessary to turn to application of those provisions. This section thus provides a review of a number of States' use of State takeover. In completing this review, we keep an eye on the racial composition of various districts affected by a takeover. Since some contend that a disproportionate number of high-minority (defined here as a more than 50% non-white population) districts are affected,[208] this section provides the relevant statistics and analysis to evaluate such claims.

A. Alabama

The Alabama State Board of Education took financial control of the Barbour County School District in 1999.[209] This partial takeover ended in 2006.[210] Over 90% of the students in this district are minorities.[211] Similarly, the Alabama State

---

203. W. VA. CODE ANN. § 18-2E-5(p)(4)(C) (West 2002 & Supp. 2008); W. VA. CODE R. § 126-13-15.6.2 (2008).

204. W. VA. CODE ANN. § 18-2E-5(q) (West 2002 & Supp. 2008); W. VA. CODE R. § 126-13-15.6.4 (2008). Once the conditions necessary for an intervention are present, the state could immediately intervene if "delaying intervention for any period of time would not be in the best interests of the students of the county school system," W. VA. CODE ANN. § 18-2E-5(q)(1) (West 2002 & Supp. 2008); W. VA. CODE R. § 126-13-15.6.4(1) (2008), or "the state board had previously intervened in the operation of the same school system and had concluded that intervention within the preceding five years." W. VA. CODE ANN. § 18-2E-5(q)(2) (West 2002 & Supp. 2008); W. VA. CODE R. § 126-13-15.6.4(2) (2008).

205. *See* W. VA. CONST. art. XII, § 6; W. VA. CODE ANN. § 18-5-1 (West 2002); W. VA. CODE ANN. § 18-5-1a (West 2002 & Supp. 2008); *see also* W. VA. CONST. art. XII, § 10.

206. 005-000-0006 WYO. CODE R. §§ 10 (b)(ii)(D) (Weil 2008); *see also id.* § 4-21.

207. *See* WYO. STAT. ANN. §§ 21-3-105, 21-3-108, 21-3-111(b)-(c), 21-6-216 (2007).

208. *See supra* notes 11-14.

209. *See* Ala. State Bd. of Educ., Resolution Removing the Barbour County School System from State Financial Intervention (Feb. 9, 2006), *available at* http://www.alsde.edu/html/boe_resolutions2.asp?id=1144.

210. *Id.*

211. *See* New Am. Found., Fed. Educ. Budget Project, Barbour County School District Demographics, http://febp.newamerica.net/k12/al/100300 (last visited Aug. 6, 2009) (reporting on the district's demographics).

Board of Education partially took over the Macon County School District in 1996, when the board financially intervened in the district.[212] In 2001, the State released the district from the partial takeover.[213] More than 97% of the students in this district are minorities.[214] From 1996 to 2000, in a partial takeover, the State took financial control of the Wilcox County School District.[215] Nearly all of that district's students are minorities.[216] In 2000, the State also took over the Bessemer City School District, which was in financial distress.[217] The State released the district from the State takeover in 2004.[218] More than 97% of the district's students are minorities.[219] Likewise from 2002 to 2005 the State took over the Greene County School District due to its financial problems.[220] The district's student body is comprised of a 100% minority population.[221]

While the State has taken over a number of high-minority districts, it has also taken over low-minority school districts. For example, the State financially intervened in the Jefferson County School District in 2000 due to the district's mounting financial distress.[222] The district emerged from State control in

---

212. *See* Ala. State Bd. of Educ., Resolution Removing the Macon County School System from State Financial Intervention (Dec. 13, 2001), *available at* http://www.alsde.edu/html/boe_resolutions2.asp?id=383&.

213. *Id.*

214. *See* New Am. Found., Fed. Educ. Budget Project, Macon County School District Demographics, http://www.febp.newamerica.net/k12/al/102190 (last visited Aug. 6, 2009) (reporting on the district's demographics).

215. *See* Ala. State Bd. of Educ., Resolution Removing the Wilcox County School System from State Financial Intervention (Dec. 14, 2000), *available at* http://www.alsde.edu/html/boe_resolutions2.asp?id=195.

216. *See* New Am. Found., Fed. Educ. Budget Project, Wilcox County School District Demographics, http://www.febp.newamerica.net/k12/al/103510 (last visited Aug. 6, 2009).

217. John Archibald & Charles J. Dean, *Lax Rules, Oversight Let Millions Disappear*, BIRMINGHAM NEWS (Ala.), Dec. 3, 2000, at 1, *available at* 2000 WLNR 8957346.

218. Ala. State Bd. of Educ., Resolution Removing the Bessemer City School System from State Financial Intervention (Mar. 11, 2004), *available at* http://www.alsde.edu/html/boe_resolutions2.asp?id=914&.

219. *See* New Am. Found., Fed. Educ. Budget Project, Bessemer City School District Demographics, http://www.febp.newamerica.net/k12/al/100330 (last visited Aug. 6, 2009).

220. *See* Ala. State Bd. of Educ., Resolution Removing the Greene County School District from State Financial Intervention (Aug. 11, 2005), *available at* http://www.alsde.edu/html/boe_resolutions2.asp?id=1072&; *see also* Charles J. Dean, *State to Run Schools in Greene County System Plummets $1.2 Million in Red*, BIRMINGHAM NEWS (Ala.), Oct. 11, 2002, at 1, *available at* 2002 WLNR 13153610; Editorial, *Turning Greene: State Takeover Is Positive Step for Rebuilding Schools*, BIRMINGHAM NEWS (Ala.), Oct. 13, 2002, at 2, *available at* 2002 WLNR 13158329.

221. *See* New Am. Found., Fed. Educ. Budget Project, Greene County School District Demographics, http://www.febp.newamerica.net/k12/al/101680 (last visited Aug. 6, 2009).

222. *See* Archibald & Dean, *supra* note 217; Rebecca Catalanello, *Jefferson County Looking*

2003.[223] A mere 39% of the students in the district are minorities.[224] Likewise, the State took over the Dale County School District for financial reasons from 2001 to 2005.[225] Just 20% of the Dale County School District students are minorities.[226] Fiscal mismanagement contributed to the takeovers in all of these districts.[227] On the other hand, the Marshall County School District, while threatened with State takeover in the midst of its financial crisis, was never actually taken over.[228] Less than 10% of that district's students are minorities.[229]

B. Arizona

Arizona took over the Colorado City Unified School District in 2005 because of declining enrollment and what the State Superintendent of Instruction characterized as "'a pattern and practice of systemic and egregious mismanagement of district property, materials, supplies, funds, and facilities.'"[230] The students in the district are mostly from the Fundamentalist Church of Jesus

---

at Dodge, MOBILE REGISTER (Ala.), Mar. 1, 2003, at A1, *available at* 2003 WLNR 15769646; *see also* Steve French, *State-Controlled Schools Need Local Involvement*, BIRMINGHAM NEWS (Ala.), Apr. 23, 2001, at 7, *available at* 2001 WLNR 11236582.

223. Vicki McClure, *Jeffco Schools Declared Stable: Richardson Ends Three Years of State Supervision*, BIRMINGHAM NEWS (Ala.), June 27, 2003, at 1, *available at* 2003 WLNR 15948655; *see also* Marie Leech, *Jeffco School System Audit Rates Another Perfect Score Clean Slate 2nd Year in Row Follows Earlier State Takeover*, BIRMINGHAM NEWS (Ala.), Mar. 29, 2008, at 2, *available at* 2008 WLNR 6199044.

224. *See* New Am. Found., Fed. Educ. Budget Project, Jefferson County School District Demographics, http://www.febp.newamerica.net/k12/al/101920 (last visited Aug. 6, 2009).

225. *See* Ala. State Bd. of Educ., Resolution Removing the Dale County School System from State Financial Intervention (Mar. 10, 2005), *available at* http://www.alsde.edu/html/boe_resolutions2.asp?id=1027&.

226. *See* New Am. Found., Fed. Educ. Budget Project, Dale County School District Demographics, http://www.febp.newamerica.net/k12/al/101050 (last visited Aug. 6, 2009).

227. *See* Archibald & Dean, *supra* note 217; McClure, *supra* note 223.

228. *See* Briefs, *Marshall County Teachers Imperiled*, BIRMINGHAM NEWS (Ala.), Sept. 18, 2005, at 20, *available at* 2005 WLNR 24080544 (discussing the Marshall County financial troubles and the potential for State takeover).

229. *See* New Am. Found., Fed. Educ. Budget Project, Marshall County School District Demographics, http://www.febp.newamerica.net/k12/al/100006 (last visited Aug. 6, 2009).

230. Mary Ann Zehr, *Ariz. Schools Chief Seeks Takeover of Troubled District*, EDUC. WK., Aug. 31, 2005, at 4; Ariz. State Bd. of Educ., Meeting Minutes (Dec. 5, 2005), *available at* http://www.azed.gov/stateboard/minutes/12-05-05.pdf; *see also* Catherine Gewertz, *Pupil Loss Hits District in Arizona*, EDUC. WK., Nov. 17, 2004, at 10 [hereinafter Gewertz, *Pupil Loss Hits District*]; Catherine Gewertz, *Student Exodus Hits Schools in 2 Towns*, EDUC. WK., Sept. 13, 2000, at 1 [hereinafter Gewertz, *Student Exodus Hits Schools*]; Nancy Perkins, *Appointee Labors on Colorado City School Finances: State Receiver Trims Airplane, Cell Phones, Cars from Budget*, DESERET MORNING NEWS, Jan. 25, 2006, at B5, *available at* 2006 WLNR 1332430.

Christ of Latter-day Saints[231] which urges its members to home-school their children, accounting for a steep decline in enrollment in the district.[232] The district remains under State control,[233] but there is some indication that it might soon emerge from State control.[234] One hundred percent of the district's students are white.[235] The State also took over the Saddle Mountain Unified School District #90 in 2007 due to financial problems in the district.[236] The district has also not yet emerged from State control.[237] About 41% of the district's student body are minorities.[238] Arizona also took over the Union Elementary School District in 2007 because of that district's fiscal troubles.[239] Like Saddle Mountain, Union Elementary School District was still under State control as of 2008.[240] The district's student body is approximately 88% minority.[241] Financial crisis in the Peach Springs Unified School District #8 led to its takeover in

---

231. Zehr, *supra* note 230.

232. Gewertz, *Pupil Loss Hits District*, *supra* note 230; Gewertz, *Student Exodus Hits Schools*, *supra* note 230.

233. *See* H.B. 2569, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

234. Ariz. State Bd. of Educ., Meeting Minutes (Jan. 22, 2007), at 3, *available at* http://www.azed.gov/stateboard/minutes/2007/01-22-07.pdf (discussing potential acceleration of the termination of the takeover); Ariz. State Bd. of Educ., Meeting Minutes (June 25, 2007), at 3, *available at* http://www.azed.gov/stateboard/minutes/2007/06-25-07.pdf (noting that if the district maintained its compliance with financial standards then the board "may propose termination" of the takeover).

235. *See* New Am. Found. Fed. Educ. Budget Project, Colorado City Unified District Demographics, http://www.febp.newamerica.net/k12/az/400021 (last visited Aug. 6, 2009).

236. Ariz. State Bd. of Educ., Meeting Minutes (June 25, 2007), *supra* note 234, at 9-10.

237. *See* H.B. 2469, 48th Leg., 2d Reg. Sess. (Ariz. 2008); Notice of Public Meeting from the Ariz. State Bd. of Educ. (Mar. 14, 2008), *available at* http://www.azed.gov/stateboard/agendas/2008/03-14-08.pdf; VERITI CONSULTING LLC, RECEIVER'S FIFTH QUARTERLY PROGRESS REPORT FOR SADDLE MOUNTAIN UNIFIED SCHOOL DISTRICT #90, at 1 (2009), *available at* http://www.veriticonsulting.com/educationconsulting.html.

238. *See* U.S. Dep't of Educ., Inst. of Educ. Sci., Nat'l Ctr. for Educ. Statistics, *District Detail for Saddle Mountain Unified School District*, http://nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=1&InstName=Saddle&State=04&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=0407170&details=5 (last visited May 7, 2009).

239. Ariz. State Bd. of Educ., Meeting Minutes (June 25, 2007), *supra* note 234, at 11-13.

240. *See* H.B. 2469, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

241. *See* New Am. Found., Fed. Educ. Budget Project, Union Elementary District Demographics, http://www.febp.newamerica.net/k12/az/408820 (last visited Aug. 6, 2009).

2007.[242] The State retains control of the district.[243] Fifty-three percent of the district's students are minorities.[244]

C. Arkansas

On Monday July 14, 2008, Arkansas took over the Greenland School District No. 95 of Washington County due to the district's financial problems.[245] The State intends to continue the takeover for at least a year, after which the State will determine whether to annex the district or give control back to the local school board.[246] Approximately 11% of the district's students are minorities.[247] In 2007, the State also took over the Bald Knob School District No. 1 in White County and removed the school board because of the district's financial crisis.[248] This district's student body is about 6% minority.[249] Arkansas also took over the Helena-West Helena School District for fiscal mismanagement;[250] the State

---

242. VERITI CONSULTING LLC, RECEIVER'S 120-DAY REPORT AND FINANCIAL IMPROVEMENT PLAN FOR PEACH SPRINGS UNIFIED SCHOOL DISTRICT #8, at 1-2 (2009), *available at* http://www.veriticonsulting.com/educationconsulting.html [hereinafter VERITI CONSULTING LLC, RECEIVER'S 120-DAY REPORT].

243. *See* H.B. 2469, 48th Leg., 2d Reg. Sess. (Ariz. 2008); Ariz. State Bd. of Educ., Meeting Minutes (May 19, 2008), at 2-3, *available at* http://www.azed.gov/stateboard/Minutes/2008/05-19-08.pdf; VERITI CONSULTING LLC, RECEIVER'S 120-DAY REPORT, *supra* note 242, at 1-2.

244. *See* New Am. Found. Fed. Educ. Budget Project, Peach Springs Unified District Demographics, http://www.febp.newamerica.net/k12/az/406120 (last visited Aug. 6, 2009).

245. Jim Watts, *Arkansas Takes Over School District, Rejects Recovery Plan*, BOND BUYER, July 16, 2008, at 4, *available at* 2008 WLNR 13243445.

246. *Id.*

247. *See* U.S. Dep't of Educ., Inst. of Educ. Sci., Nat'l Ctr. for Educ. Statistics, District Detail for Greenland School District, *available at* http://nces.ed.gov/ccd/districtsearch/district_detail.asp?Search=1&InstName=Greenland+&State=05&DistrictType=1&DistrictType=2&DistrictType=3&DistrictType=4&DistrictType=5&DistrictType=6&DistrictType=7&NumOfStudentsRange=more&NumOfSchoolsRange=more&ID2=0506930&details=5 (last visited Apr. 14, 2009).

248. Jim Watts, *Arkansas: Bald Knob Gets More Time*, BOND BUYER, Oct. 2, 2007, at 9; *see also* News Release, Ark. Dep't of Educ., ADE Recommends Annexation for Bald Knob (Aug. 22, 2007), *available at* http://www.arkansased.org/communications/pdf/bald_knob_release_082207.pdf [hereinafter News Release, ADE Recommends Annexation].

249. *See* New Am. Found., Fed. Educ. Budget Project, Bald Knob School District Demographics, http://www.febp.newamerica.net/k12/ar/502700 (last visited Aug. 6, 2009).

250. News Post, *State's Takeover of Helena-West Helena School District Discussed*, ARK. NEWS BUREAU, Oct. 14, 2005, *available at* http://www.arkansasnews.com/archive/2005/10/14/states-takeover-of-helena-west-helena-school-district-discussed/. For a recent legislative financial audit of the district, see ARK. LEGISLATIVE JOINT AUDITING COMM., HELENA-WEST HELENA SCHOOL DISTRICT NO. 2: REGULATORY BASIS FINANCIAL STATEMENTS AND OTHER REPORTS (June 30, 2007), *available at* http://www.legaudit.state.ar.us/AuditReports/PublicSchools/2007/HelenaWestHelenaSD2007.pdf.

removed the school board.[251] Over 90% of the district's student body are minority.[252]

In 2006, Arkansas took over the Eudora School District and removed its board for failing to submit an acceptable plan for emerging from fiscal distress after the State afforded the district time to do so.[253] Nearly all the district's students are minorities.[254] A state senator suggested that race might be a factor in the State's takeover decisions.[255] That senator later apologized.[256] There is no direct evidence that racism motivated the takeovers in the State.[257] The State board took over the Midland School District in 2006 for fiscal problems, and the State replaced the local school board.[258] Less than 3% of the district's student body is minority.[259] In May 2007, the State Board of Education informed the Helena-West Helena and Midland school districts that control would be "incrementally restored" to the local school boards beginning in 2007.[260] On July 14, 2008, the state board voted to approve the State Superintendent's recommendation that the State remove the Greenland School District.[261] It

---

251. *See* News Release, Ark. Dep't of Educ., State Removes Eudora School Board from Office (Jan. 13, 2006), *available at* http://www.arkansased.org/communications/pdf/eudorafirst0113.pdf [hereinafter News Release, State Removes Eudora School Board].

252. *See* New Am. Found., Fed. Educ. Budget Project, Helena-West Helena School District Demographics, http://www.febp.newamerica.net/k12/ar/507680 (last visited Aug. 6, 2009).

253. *See* News Release, State Removes Eudora School Board, *supra* note 251. The Eudora School District eventually "was annexed into the Lakeside (Chicot County) school district at of the beginning of the 2006-2007 school year." News Release, ADE Recommends Annexation, *supra* note 248.

254. *See* New Am. Found., Fed. Educ. Budget Project, Eudora Public School District Demographics, http://www.febp.newamerica.net/k12/ar/500007 (last visited Aug. 6, 2009).

255. *See* News Post, *State's Takeover of Helena-West Helena*, *supra* note 250.

256. *See id.*

257. *See id.* In fact, with respect to the Helena-West Helena takeover, the senator stated that "he did not mean to suggest racism was the reason for the state's takeover of Helena-West Helena." *Id.*

258. *See* Ark. State Bd. of Educ., Meeting Minutes (Feb. 13, 2006), at 3-4, *available at* http://www.arkansased.org/sbe/pdf/sbe_minutes_021306.pdf; *see generally* News Release, Ark. Dep't of Educ., State Takes Administrative Control over Midland School District (Jan. 13, 2006), *available at* http://www.arkansased.org/communications/pdf/midland0113.pdf.

259. *See* New Am. Found., Fed. Educ. Budget Project, Midland School District Demographics, http://www.febp.newamerica.net/k12/ar/50020 (last visited Aug. 6, 2009).

260. *See* News Release, Ark. Dep't of Educ., Helena-West Helena, Midland Districts to Regain Some Control (May 7, 2007), at 1, *available at* http://www.arkansased.org/communications/pdf/districts_regain_release_050707.pdf. A separate press release also stated that the Midland School District would "eventually regain control of its school district after the September school board elections, in which all school board positions are open and subsequent training." *See* News Release, ADE Recommends Annexation, *supra* note 248, at 2.

261. *See* Ark. State Bd. of Educ., Meeting Minutes (July 14, 2008), at 2-3, *available at*

appears that the board members were subsequently removed.[262]

The State board also effectuated the takeover of the Decatur School District for financial mismanagement.[263] About 33% of the district's student body are minority.[264]

D. California

In 2003, California took over the West Fresno Elementary School District because of fiscal instability.[265] It is important to note that in California, when takeovers occur, local school boards usually lose voting power.[266] This loss of power led to citizen outcry and allegations of racial animus in the West Fresno District.[267] However, residents' cries about denial of their right to vote and racism in the decision to take over the West Fresno District were to no avail, and no one presented any evidence of any such racial animus.[268] A state-appointed administrator was given total control of the district in 2005.[269] As of September 2008, the administrator retains control over academics and finances and the power to overrule the decisions of the local school board.[270] As reported by the

---

http://www.arkansased.org/sbe/pdf/sbe_minutes_071408.pdf.

262. *See* Associated Press, *Arkansas to Take Over Troubled School District*, AP ALERT (Ark.), July 14, 2008; News Release, Ark. Dep't of Educ., Greenland (July 24, 2008), *available at* http://arkansased.org/communications/pdf/greenland_release_072408.pdf (announcing a new superintendent for the district and noting the removal of the previous board).

263. *See* News Release, Ark., Dep't of Educ., Decatur (Aug. 7, 2008), *available at* http://www.arkansased.org/communications/pdf/decatur_release_080708.pdf; Leadership Support Serv., Ark. Dep't of Educ., *State Takes Control of Two Districts*, ARK. EDUC. MATTERS, Sept. 2008, at 5, *available at* http://www.arkansased.org/communications/pdf/ed_matters_v1n1_0908.pdf.

264. *See* New Am. Found., Fed. Educ. Budget Project, Decatur School District Demographics, http://www.febp.newamerica.net/k12/ar/504980 (last visited Aug. 6, 2009).

265. Anne Dudley Ellis, *West Fresno Board Is Back: School District Moves Toward Local Control*, FRESNO BEE (Cal.), Sept. 1, 2008, at A1, *available at* 2008 WLNR 16606653; *Progress in West Fresno: School District Gets Partial Measure of Control Back from the State, Five Years After Painful Takeover*, FRESNO BEE (Cal.), Sept. 3, 2008, at C4, *available at* 2008 WLNR 16683885 [hereinafter *Progress in West Fresno*].

266. Meredith May, *Panel OKs Oakland Loan $100 Million to Bail Out Schools*, S.F. CHRON., Apr. 10, 2003, at A27.

267. *See* Lesli A. Maxwell, *Appeals Fail to Halt Takeover Bill Senate Committee Hears Residents' Allegations of Racism Against Pete Mehas*, FRESNO BEE (Cal.), Feb. 20, 2003, at A1, *available at* 2003 WLNR 2840353 (noting several comments by citizens regarding racial animus).

268. *See id.* (noting that despite the outcry, the financial numbers led the Senate Committee to vote for the takeover).

269. *See* Ellis, *supra* note 265.

270. *Id.* The board now has some management and operational control, such as power over district facilities and staff. *Id.* However, the administrator retains the power to override board decisions. *Id.*

Fresno Bee, in 2008 the "district's five-member board cast its first real vote since the state took control of district affairs in 2003,"[271] as the district finally regained a level of control.[272] If the district continues improving, then the district may regain full control in 2009.[273] Approximately 96% of the district's students are minorities.[274]

California took over the Oakland Unified School District in 2003 as a result of the district's burgeoning financial crisis.[275] By 2008, the State had restored some control to the local board such as power over facilities, community, relations, and personnel, "including the authority to hire a leader who would report directly to the locally elected officials for the first time since the 2003 fiscal crisis and [S]tate takeover."[276] The State retains control over the budget and academic policy.[277] This district has a 94% minority student body.[278]

The State took over the Coachella Valley Unified School District in 1992 due to a district financial crisis.[279] Eventually, the State restored control to the local board,[280] but the district is still under great threat of takeover for failing to make AYP pursuant to the NCLB.[281] Approximately 99% of the district's students are

---

271. *Progress in West Fresno*, *supra* note 265.

272. Ellis, *supra* note 265 (noting that the local board has management and operational control but that finances are still in the control of the State administrator).

273. *Id.*

274. *See* New Am. Found., Fed. Educ. Budget Project, West Fresno Elementary Demographics, http://www.febp.newamerica.net/k12/ca/6145808 (last visited Aug. 6, 2009).

275. *See* Katy Murphy, *Board Names Interim Superintendent: Appointment of Top Official Is First under Local Control Since 2003*, OAKLAND TRIB., Apr. 10, 2008, n.p., *available at* 2008 WLNR 6710507 [hereinafter Murphy, *Board Names Interim Superintendent*]; Katy Murphy, *Oakland Schools Get Interim Superintendent*, OAKLAND TRIB., Apr. 9, 2008, n.p., *available at* 2008 WLNR 6688380; Katy Murphy, *School Board Regains Some Autonomy: Two Departments, Ability to Hire Superintendent Return to Local Control*, OAKLAND TRIB., Apr. 9, 2008, n.p., *available at* 2008 WLNR 6640179 (all noting that the takeover occurred in 2003).

276. Murphy, *Board Names Interim Superintendent*, *supra* note 275.

277. *Id.*

278. *See* New Am. Found., Fed. Educ. Budget Project, Oakland Unified Demographics, http://www.febp.newamerica.net/k12/ca/628050 (last visited Aug. 6, 2009).

279. *See* J. Douglas Allen-Taylor, *School Takeover Oversight Committee to Hold Hearings Early Next Year*, BERKELEY DAILY PLANET, Oct. 23, 2007, *available at* http://www.berkeleydailyplanet.com/issue/2007-10-23/article/28289 (last visited Apr. 15, 2009); Katy Murphy, *State Senators Hear Advice on School Debt and Takeovers*, OAKLAND TRIB., Dec. 4, 2007, n.p., *available at* 2007 WLNR 23987941.

280. Shirin Parsavand, *Coachella Schools: District Warned of State Takeover*, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 19, 2007, at A1.

281. *See* Kimberly Cheng, *Coachella Valley Unified Faces Severe State Action*, CBS 2 NEWS, Mar. 3, 2008, http://www.kpsplocal2.com/Global/story.asp?S=7936689 (last visited Apr. 15, 2009); Parsavand, *supra* note 280 ("The district increased its chances of a state takeover by accepting a $2 million grant in 2005. As a condition of the grant, Coachella Valley officials promised to meet

minorities.[282]

In 2004, the State took over the Vallejo City Unified School District after the school board voted to turn over the district to the State due to its fiscal crisis.[283] The district regained partial control in 2007, with the State retaining authority to override those decisions that could harm the district financially.[284] The district has about an 87% minority student body.[285]

Academic and financial problems in the Compton Unified School District led to the district's takeover in 1993.[286] The district returned to local control in 2003.[287] Almost all the district's students are minorities.[288]

Because of fiscal mismanagement, California took over the Emery Unified School District in 2001.[289] The State restored control to the local school board in 2004.[290] Approximately 98% of the district's students are minorities.[291]

---

the law by this year or be subject to harsher sanctions under the law."); Associated Press, *State Takeover Possible Because of Coachella Schools Test Scores*, AP ALERT (Cal.), Dec. 19, 2007.

282. *See* New Am. Found., Fed. Educ. Budget Project, Coachella Valley Unified Demographics, http://www.febp.newamerica.net/k12/ca/609070 (last visited Aug. 6, 2009).

283. Simone Sebastian, *Vallejo School Board Hands Control to State $20 Million Debt Too Deep for Locals to Dig out of Alone*, S.F. CHRON., Apr. 1, 2004, at B1.

284. Rich Saskal, *California: Vallejo USD Regains Control*, BOND BUYER, July 20, 2007, at 9, *available at* 2007 WLNR 13817548.

285. *See* New Am. Found., Fed. Educ. Budget Project, Vallejo City Unified Demographics, http://www.febp.newamerica.net/k12/ca/640740 (last visited Aug. 6, 2009).

286. *See* Alex Katz, *Schools' Boss Vows Tight Ship: State Administrator Ward Starts Today, Already Has Cracked Down on Student Absenteeism*, ALAMEDA TIMES-STAR (Cal.), June 16, 2003, n.p., *available at* 2003 WLNR 16018290.

287. *See id.* It appears that at least partial control was restored in 2001. *See* Ian Hanigan, *Compton Reclaims Its Schools; Education: Locals Take Control After Eight Years of Intervention from State*, LONG BEACH PRESS-TELEGRAM, Dec. 13, 2001, at A1, *available at* 2001 WLNR 1291333. Full control was restored in 2003. *See* Katz, *supra* note 286.

288. *See* New Am. Found., Fed. Educ. Budget Project, Compton Unified Demographics, http://www.febp.newamerica.net/k12/ca/609620 (last visited Aug. 6, 2009).

289. *See State to Control Emery Unified School District*, W. COUNTY TIMES (Cal.), Dec. 24, 2000, at A28, *available at* 2000 WLNR 5371199; Dan Walters, *Misconduct Jeopardizes School Funds*, FRESNO BEE (Cal.), Aug. 13, 2001, at A9, *available at* 2001 WLNR 1649525 [hereinafter Walters, *Misconduct*]; Dan Walters, *Why School Districts Collapse*, LONG BEACH PRESS-TELEGRAM, Aug. 14, 2001, at A7, *available at* 2001 WLNR 1288282.

290. *See* Simone Sebastian, *Emeryville Schools Hailed as Model for Recovery Community Support Leads to Improved Test Scores, Finances*, S.F. CHRON., Oct. 4, 2005, at B1; *see also* Alex Katz, *2 Years Later, School District is On Track: State Overseer Who Helped Rein in Budget is Moving on to New Job*, ALAMEDA TIMES-STAR, Nov. 19, 2003, n.p., *available at* 2003 WLNR 16002722 [hereinafter Katz, *2 Years Later*] (discussing how in 2003 the district regained its financial footing which led to the district eventually regaining control).

291. *See* New Am. Found., Fed. Educ. Budget Project, Emery Unified Demographics,

While the State has taken over many minority districts, there appears to be no evidence that the takeovers were a result of racial animus.[292] Indeed, many of these districts were laden with corruption, and the State was left with no choice but to take them over.[293] Further, in a number of districts, frustrated residents themselves petitioned to recall the elected board.[294]

E. Illinois

In 1994, Illinois took over the East St. Louis School District due to the district's financial troubles.[295] The State appointed a panel to oversee the finances of the district but retained the board;[296] the state-appointed panel, however, maintained the power to veto the decisions of the board.[297] In 2004, before restoring full control to the district, the State, in an agreement with the

---

http://www.febp.newamerica.net/k12/ca/612630 (last visited Aug. 6, 2009).

292. *See supra* notes 265-91 and accompanying text.

293. *See, e.g.*, Katz, *2 Years Later*, *supra* note 290 (noting that bankruptcy led to the Emery Unified School District takeover); Alex Katz, *Oakland Schools Face Investigation*, OAKLAND TRIB., Feb. 11, 2004, n.p., *available at* 2004 WLNR 1709673 (noting fraud investigations into the Oakland school district); Erin Kennedy, *W. Fresno Schools Get New Official Kern County Educator Selected to Replace Retiring Administrator*, FRESNO BEE (Cal.), May 13, 2005, at B1, *available at* 2005 WLNR 24051577 (noting that after the takeover several board members faced embezzlement and theft charges); Meredith May, *School District's Back in the Black Emeryville Emerges from Bankruptcy in 2-Year Turnaround*, S.F. CHRON., Nov. 14, 2003, at A19 (noting that the initial takeover was initiated in response to "a spendthrift superintendent"); *Progress in West Fresno*, *supra* note 265 (noting that the initial takeover was sparked in part by criminal charges which were brought against school board officials); Walters, *Misconduct*, *supra* note 289 (noting "near-bankrupt finances" and a "useless" accounting system as reasons for the State takeover of the Emery Unified School District).

294. *See* Kennedy, *supra* note 293 (noting recall fights in West Fresno); Meredith May, *Recall Threat for Emeryville School Board $1.8 Million Debt Made Parents Angry*, S.F. CHRON., Jan. 10, 2001, at A13; *Progress in West Fresno*, *supra* note 265 (noting recall fights in West Fresno); Rochelle Williams, *California Board Recall*, BOND BUYER, Jan. 12, 2001, at 33, *available at* 2001 WLNR 837311 (noting a call for board recall in Emeryville).

295. Peter Schmidt, *Ill. Board Moves to Take Over Troubled East St. Louis Schools*, EDUC. WK. Oct. 26, 1994, n.p.; *see also* Aisha Sultan, *Panel Opposes Giving Money Control to East St. Louis Board: School Board Members Act from Personal, Political Interest, Report Says*, ST. LOUIS POST-DISPATCH, Feb. 22, 2001, at A1, *available at* 2001 WLNR 11360687.

296. Sultan, *supra* note 295. For a sample report from the oversight panel, see FINANCIAL OVERSIGHT PANEL FOR EAST ST. LOUIS SCHOOL DISTRICT NO. 189, ANNUAL REPORT TO THE STATE SUPERINTENDENT (2000), *available at* http://www.isbe.state.il.us/board/meetings/feb01meeting/ESLannual.pdf.

297. Sultan, *supra* note 295; *see generally* E. St. Louis Fed'n of Teachers v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel, 687 N.E.2d 1050 (Ill. 1997); E. St. Louis Fed'n of Teachers v. E. St. Louis Sch. Dist. No. 189 Fin. Oversight Panel, 725 N.E.2d 797 (Ill. App. Ct. 2000) (both showing the extended powers the oversight board has over the local board's decisions).

local board, dissolved the panel and replaced it with a transition committee.[298] Nearly all of the district's students are minorities.[299] The Venice Community Unit School District #3 voted to petition the State to take over the district.[300] Subsequently, in 2003 the State did take over the district because of its financial problems.[301] The district remains under the financial takeover.[302] The district's student body is 95% minority.[303]

Round Lake Area Schools District 116 also experienced a financial takeover in 2000 when an oversight panel was appointed for the district.[304] Continuing financial and educational problems in the district resulted in the State's appointment of a School Finance Authority to replace the panel in 2002.[305] The district remains under the control of the School Finance Authority.[306] Over 70% of the district's students are minorities.[307] Dire insolvency in the Hazel Crest School District 152.5 led to its financial takeover in 2002.[308] In December 2002,

---

298. *See* Press Release, Ill. State Bd. of Educ., East St. Louis Board of Education and ISBE Join Together: Agreement Ensures Continued Financial Stability (June 9, 2004), *available at* http://www.isbe.net/news/2004/june9_04.htm; Press Release, Ill. State Bd. of Educ., Schiller Announces East St. Louis Interim CEO (June 24, 2004), *available at* http://www.isbe.net/news/2004/june24_04.htm.

299. *See* New Am. Found., Fed. Educ. Budget Project, East St. Louis School District 189 Demographics, http://www.febp.newamerica.net/k12/il/1713320 (last visited Aug. 6, 2009).

300. Ill. State Bd. of Educ., Motion to Grant Petition for Emergency Financial Assistance and the Establishment of a Financial Oversight Panel for Venice Community Unit School District 3 (2003), *available at* http://www.isbe.net/news/2003/venice_petition_motion.htm [hereinafter Ill. State Bd. of Educ., Motion to Grant Petition].

301. *Id.*; Press Release, Ill. State Bd. of Educ., State Superintendent Appoints Three-Member Oversight Panel for Venice School District (July 3, 2003), *available at* http://www.isbe.net/news/2003/jul3-03.htm.

302. For more information on the state-appointed oversight panel, see School Fin., Ill. State Bd. of Educ., Venice Community Unit School District #3 Financial Oversight Panel, http://www.isbe.net/finance/v/default.htm (last visited Apr. 16, 2009).

303. *See* New Am. Found., Fed. Educ. Budget Project, Venice Community Unit School District Demographics, http://www.febp.newamerica.net/k12/il/1740200 (last visited Aug. 6, 2009).

304. *See* Press Release, School Fin., Ill. State Bd. of Educ., State Board Authorizes School Finance Authority for Round Lake School District 116: State Superintendent Names Members, Aug. 21, 2002, *available at* http://www.isbe.net/finance/RL/pr082102.htm.

305. *Id.*

306. *Id.* For more information on the state-appointed School Finance Authority, see School Fin., Ill. State Bd. of Educ., Round Lake Area Schools District # 116: School Finance Authority, *available at* http://www.isbe.net/finance/RL/default.htm.

307. *See* New Am. Found., Fed. Educ. Budget Project, Round Lake Area Schools District Demographics, http://www.febp.newamerica.net/k12/il/1734990 (last visited Aug. 6, 2009).

308. *See* Press Release, Ill. State Bd. of Educ., State Board of Education Approves Continuation of Hazel Crest School District for FY05, Board Cites District's Dramatic Turnaround Under School Finance Authority (Jan. 22, 2004), *available at* http://www.isbe.net/news/

a School Finance Authority replaced the oversight panel that the State appointed after the takeover.[309] In fact, the local school board members voted to dissolve the district prior to the School Finance Authority takeover, but the State chose not to dissolve it.[310] The district remains under the control of the School Finance Authority.[311] More than 96% of the district's student body are minority.[312] Financial crisis also spurred the financial takeover of the Cairo Unit School District 1 in 2003 through the appointment of an oversight panel.[313] This takeover, which occurred after a petition by the local board for the district, continues.[314] Approximately 91% of the district's students are minorities.[315]

The State took over the Chicago Public School District in 1979 to address the grim financial condition of the district.[316] In 1995, to address continuing financial and academic problems, the State transferred control to the mayor of Chicago[317] where it remains today.[318] The mayor appoints the members of the

---

2004/jan22-04.htm [hereinafter Press Release, Ill. State Bd. of Educ., Continuation of Hazel Crest Schools].

309. Press Release, Ill. State Bd. of Educ., Continuation of Hazel Crest Schools, *supra* note 308; Press Release, School Fin., Ill. State Bd. of Educ., State Board of Education Established School Finance Authority for Hazel Crest Schools (Dec. 9, 2002), *available at* http://www.isbe.net/finance/HC/pr120902.htm [hereinafter Press Release, Ill. State Bd. of Educ., Finance Authority for Hazel Crest Schools]; Press Release, School Fin., Ill. State Bd. of Educ., State Superintendent Appoints School Finance Authority Members for Hazel Crest Schools: Reassures Community That Schools Will Complete Year (Dec. 23, 2002), *available at* http://www.isbe. net/finance/HC/pr122302.htm.

310. Press Release, Ill. State Bd. of Educ., Continuation of Hazel Crest Schools, *supra* note 308; Press Release, Ill. State Bd. of Educ., Finance Authority for Hazel Crest Schools, *supra* note 309.

311. For more on the state-appointed School Finance Authority, see School Fin., Ill. State Bd. of Educ., Hazel Crest School District 152-5 School Finance Authority, http://www.isbe. net/finance/HC/default.htm (last visited Apr. 16, 2009).

312. *See* New Am. Found., Fed. Educ. Budget Project, Hazel Crest School District 152-5 Demographics, http://www.febp.newamerica.net/k12/il/1718600 (last visited Aug. 6, 2009).

313. Ill. State Bd. of Educ., Meeting Minutes (Feb. 6, 2003), at 2-5, *available at* http://www.isbe.net/board/meetings/feb03special.pdf.

314. *See id.* at 4-5 (noting that the district petitioned for the takeover); Press Release, Ill. State Bd. of Educ., State Board Approves Oversight Panel for Cairo School District (Feb. 6, 2003), *available at* http://www.isbe.net/news/2003/feb6-03.htm [hereinafter Press Release, Ill. State Bd. of Educ., Cairo School District]; Ill. State Bd. of Educ. For more on the State-appointed School Finance Authority, see Sch. Fin., Ill. State Bd. of Educ., Cairo Unit School District 1 Financial Oversight Panel, *available at* http://www.isbe.net/finance/C/default.htm.

315. *See* New Am. Found., Fed. Educ. Budget Project, Cairo Community Unit School District Demographics, http://www.febp.newamerica.net/k12/il/1708070 (last visited Aug. 6, 2009).

316. *See* Yvette Shields, *Chicago School Reformer Stepping Down After Six Years at Helm*, BOND BUYER, June 8, 2001, at 3, *available at* 2001 WLNR 835351.

317. Paul G. Vallas, *Making the Grade: Chicago Schools CEO Tells How He Rescued a*

school board.[319] Nearly 92% of the students in the Chicago Public Schools are minorities.[320] While it appears that the State has taken over mostly minority districts, there is no indication that racial animus was involved in the takeover decisions.[321] Indeed, as noted earlier, some local boards actually petitioned for the State takeover.[322] Moreover, there is no question that the districts that the State did take over were in financial crisis.[323]

F. Kentucky

Financial and academic problems in the Whitley County School District triggered Kentucky's takeover of the district in 1989.[324] A year later the State restored control to the district.[325] Ninety-three percent of the district's students are white.[326] Also in 1989, the State took over the Floyd County School District.[327] In 1990, the school district regained control.[328] Eight years later, however, the State reassumed control because of continuing financial troubles and poor management in the district.[329] The district regained control in 2005.[330] Approximately 94% of Floyd County School District's students are white.[331] The State took over the Letcher County District in 1994 to address mismanagement of the district and its financial crisis.[332] The State returned control to the district

---

Failing System, DENVER POST, Apr. 18, 1999, at H01; *see also* 105 ILL. COMP. STAT. ANN. 5/34-3 (West 2006) (establishing the new Chicago Board of Education).

318. *See* Shields, *supra* note 316.

319. *See* Chicago Public Schools, http://cps.edu/About_CPS/The_Board_of_Education/Pages/TheChicagoBoardofEducation.aspx (last visited Apr. 16, 2009).

320. *See* New Am. Found., Fed. Educ. Budget Project, City of Chicago School District Demographics, http://www.febp.newamerica.net/k12/il/1709930 (last visited Aug. 6, 2009).

321. *See supra* notes 295-320 and accompanying text.

322. *See, e.g.*, Ill. State Bd. of Educ., Motion to Grant Petition, *supra* note 300; Press Release, Ill. State Bd. of Educ., Cairo School District, *supra* note 314.

323. *See supra* notes 294-319 and accompanying text.

324. Reagan Walker, *2 Kentucky Districts Deemed 'Deficient,' Face State Takeover*, EDUC. WK., Jan. 18, 1989, n.p.; *District News Roundup*, EDUC. WK., May 23, 1990, n.p..

325. *See District News Roundup*, *supra* note 324.

326. *See* New Am. Found., Fed. Educ. Budget Project, Whitley County School District Demographics, http://www.febp.newamerica.net/k12/ky/2105880 (last visited Aug. 6, 2009).

327. Walker, *supra* note 324.

328. *District News Roundup*, *supra* note 324.

329. Raviya H. Ismail & Linda J. Johnson, *Kentucky Schools Struggle with Federal Mandate*, LEXINGTON HERALD-LEADER, Aug. 6, 2008, *available at* http://www.kentucky.com/news/state/story/481216.html; Kerry A. White, *Ky. Chief Says State Should Take Over District*, EDUC. WK., Nov. 19, 1997, n.p.

330. Ismail & Johnson, *supra* note 329.

331. *See* New Am. Found., Fed. Educ. Budget Project, Floyd County School District Demographics, http://www.febp.newamerica.net/k12/ky/2101950 (last visited Aug. 6, 2009).

332. White, *supra* note 329; Lonnie Harp, *Audit Spurs Board to Eye Takeover of Ky. District*,

in 1997.[333] About 93% of the students in the district are white.[334] The districts taken over in Kentucky have been heavily non-minority districts.[335] Ostensibly, there is no racial animus here, as districts taken over had major financial or other problems.[336]

G. Maryland

Maryland took over Prince George's County Public Schools in 2002 because of a history of poor management and infighting on the school board.[337] The State appointed a new board to replace the elected board.[338] In 2006, the State restored control to an elected school board.[339] However, the district remains under threat of takeover for failure to make AYP.[340] The district's student body is close to 94% minority.[341] In 1997, the State partially took over the Baltimore City Public Schools in a State partnership agreement with the City, due to financial, academic, and other troubles in the district.[342] Pursuant to this partnership, the mayor and the governor jointly appoint the district's board members.[343] Approximately 92% of the district's students are minorities.[344] While both districts are disproportionately minority, there was no apparent racial animus in the takeovers as burgeoning financial and academic problems dictated

---

EDUC. WK., May 25, 1994, n.p.

333. *See* White, *supra* note 329.

334. *See* New Am. Found., Fed. Educ. Budget Project, Letcher County School District Demographics, http://www.febp.newamerica.net/k12/ky/2103360 (last visited Aug. 6, 2009).

335. *See supra* notes 324-34 and accompanying text.

336. *See supra* notes 324-34 and accompanying text.

337. David J. Hoff, *Maryland: Maryland Generates Record School Aid*, EDUC. WK., May 29, 2002, at 20. This takeover was made possible by House Bill 949. H.B. 949, Reg. Sess. (Md. 2002).

338. *See* Hoff, *supra* note 337.

339. *See* Steve Giegerich, *The Jury Is Still Out*, ST. LOUIS POST-DISPATCH, Feb. 14, 2007, at A1, *available at* 2007 WLNR 11976107 (noting that the district regained control in November 2006).

340. *See* Guy Leonard, *Next Two Years Critical for County Schools System*, GAZETTE.NET, Nov. 9, 2006, http://www.gazette.net/stories/110906/princou194118_31944.shtml (noting that the district was placed on a state watch list for failure to meet national standards).

341. *See* New Am. Found., Fed. Educ. Budget Project, Prince Georges County Public Schools Demographics, http://www.febp.newamerica.net/k12/md/2400510 (last visited Aug. 6, 2009).

342. David J. Hoff, *Baltimore Bailout in Doubt; State Takeover on the Table*, EDUC. WK., Mar. 3, 2004, at 6; Hoff, *supra* note 337. This takeover was made possible by Senate Bill 795. S.B. 795, Reg. Sess. (Md. 1997).

343. *See* BALT. CITY BD. OF SCH. COMM'RS, SCHOOL BOARD RULES, ARTICLE 1: BOARD OF SCHOOL COMMISSIONERS, *available at* http://www.baltimorecityschools.org/School_Board/PDF/Article_1.pdf; *see also* Hoff, *supra* note 337; Jessica L. Sandham, *Despite Takeover Laws, States Moving Cautiously on Interventions*, EDUC. WK., Apr. 14, 1999, at 21.

344. *See* New Am. Found., Fed. Educ. Budget Project, Baltimore City Public School System Demographics, http://www.febp.newamerica.net/k12/md/2400090 (last visited Aug. 6, 2009).

the State decisions to intervene in the districts.[345]

H. Massachusetts

A multitude of problems—including academic, financial, and managerial—in the Chelsea Public Schools led to its takeover in 1989.[346] The State authorized Boston University, in an agreement with the Chelsea School Committee, to take over management and implement reforms in the district.[347] The State allowed the City of Chelsea to transfer powers traditionally given to an elected school committee to the university.[348] Known as the Boston University/Chelsea Partnership, the takeover was originally intended to last for ten years.[349] However, the university and the school committee mutually agreed to extend the agreement until 2003 and then later extended it until June 30, 2008.[350] Since the district was predominately a minority district, several minorities protested the takeover.[351] They expressed concerns that the State did not respect the voices of minorities that were against the takeover, and the minorities even tried to use the judicial system to stop the agreement.[352] Such efforts were to no avail.[353] During the partnership, the University agreed to keep the Chelsea School Committee in place.[354] The University created a Boston University Management Team to manage the district, and this team was accountable to the school committee.[355] About 89% of the district's students are minorities.[356]

---

345. *See supra* notes 337-44 and accompanying text.

346. John Gehring, *Boston University-Chelsea Match Endures*, EDUC. WK., Nov. 23, 2004, at 1; Robert Rothman, *Governor Creates Panel to Monitor Chelsea Accord*, EDUC. WK., June 21, 1989, n.p.; *see also* Boston Univ. Sch. of Educ., The Boston University/Chelsea Partnership, http://web.bu.edu/sed/outreachProjects/chelsea (last visited Apr. 17, 2009).

347. Rothman, *supra* note 346. The state legislature made the partnership by enacting Chapter 133 of the Acts of 1989. Legis. Acts 1989, Chap. 133 (Mass. 1989), *available at* http://archives.lib.state.ma.us/actsResolves/1989/1989acts10133.pdf; *see also* Gehring, *supra* note 346; *Silber and Chelsea: A Lasting Legacy?*, EDUC. WK., Nov. 5, 1997, n.p.; *Silber Enters Governor's Race*, EDUC. WK., Jan. 24, 1990, n.p. (all outlining the 1989 State takeover).

348. Legis. Acts 1989, Chap. 133, § 2 (Mass. 1989), *available at* http://archives.lib.state.ma.us/actsResolves/1989/1989acts0133.pdf.

349. *See* Rothman, *supra* note 346.

350. Chelsea Public Schools, Boston University/Chelsea Partnership, http://www.chelseaschools.com/management_team/ (last visited Apr. 17, 2009); *see also* Gehring, *supra* note 346.

351. *See* Gehring, *supra* note 346; Rothman, *supra* note 346.

352. Gehring, *supra* note 346.

353. *Id.*

354. *See* Boston Univ. Sch. of Educ., *supra* note 346.

355. Gehring, *supra* note 346. For more on the Boston University/Chelsea Partnership, see generally Boston Univ. Sch. of Educ., *supra* note 346; Chelsea Public Schools, *supra* note 350.

356. *See* New Am. Found., Fed. Educ. Budget Project, Chelsea Demographics, *available at* http://www.febp.newamerica.net/k12/ma/2503540 (last visited Aug. 6, 2009).

Massachusetts partially intervened in the Lawrence Public Schools beginning in 1998 pursuant to a memorandum of agreement with the City of Lawrence.[357] That agreement authorized the State, in consultation with the mayor, to appoint a state representative for the district.[358] Various problems in the district, including mismanagement and fiscal instability, catalyzed the partial "friendly" takeover that gave the State new authority over the district.[359] The State opened an office in the district "to oversee daily operations and provide technical assistance to school administrators."[360] The State also appointed a representative in 2000 "to guide the management and governance of [the district]."[361] This included the district "budget, personnel, contracts, collective bargaining, major policy issues and all improvement plans for the district."[362] The local election of board members continued.[363] The district and the State decided to extend the memorandum of agreement which permitted the State intervention, until 2005.[364] The district has about a 92% minority student body.[365]

The State took over the Boston Public Schools in 1991 because of various troubles in the school district.[366] A mayorally appointed board replaced the elected board.[367] In 1996, by a referendum, the voters chose to maintain the mayoral-appointment system for the school board, and this arrangement

---

357. Robert C. Johnston, *Lawrence, Mass., Reaches Deal With State*, EDUC. WK., Feb. 4, 1998, n.p.; Press Release, Massachusetts Dep't of Elementary & Secondary Educ., Commissioner of Education Appoints Representative to Guide Lawrence Public Schools (Jan. 31, 2000) *available at* http://www.doe.mass.edu/news/news.asp?id=691 [hereinafter Press Release, Commissioner of Education Appoints Representative].

358. Johnston, *supra* note 357; Press Release, Commissioner of Education Appoints Representative, *supra* note 357.

359. *See Association Expected to Yank Accreditation of District's Only High School*, EDUC. WK., Feb. 12, 1997, n.p.; Caroline Hendrie, *Mass. Board Moves to Take Over Lawrence Schools*, EDUC. WK., June 25, 1997, n.p.; Johnston, *supra* note 357; Commissioner's Update from Robert V. Antonucci, Mass. Comm'r of Educ., to Mass. Local Sch. Districts (Jan. 21, 1998), *available at* http://www.doe.mass.edu/mailings/1998/cm012198.pdf. Some characterize the friendly takeover as a partnership. *See, e.g.*, MASSACHUSETTS DEP'T OF ELEMENTARY & SECONDARY EDUC., *Lawrence Public Schools Partnership: Proposal to Update Agreement*, *in* BOARD IN BRIEF (Mar. 25, 2003), *available at* http://www.doe.mass.edu/boe/bib/03/0325.html.

360. Johnston, *supra* note 357.

361. Press Release, Commissioner of Education Appoints Representative, *supra* note 357.

362. *Id.*

363. *See* Johnston, *supra* note 357.

364. *See, e.g.*, MASSACHUSETTS DEP'T OF ELEMENTARY & SECONDARY EDUC., *supra* note 359.

365. *See* New Am. Found., Fed. Educ. Budget Project, Lawrence Demographics, http://www.febp.newamerica.net/k12/ma/2506660 (last visited Aug. 6, 2009).

366. The legislature enabled this takeover by special legislation. Legis. Acts 1991, Chap. 133 (Mass. 1989); *see also* Boston Public Schools, http://www.bostonpublicschools.org/node/285 (last visited Apr. 19, 2009) (discussing the 1991 legislation and the steps leading up to such legislation).

367. *A History of Intervention*, EDUC. WK., Jan. 9, 2002, at 14.

continues to date.[368] Approximately 86% of the district's students are minorities.[369] Despite the demographics of the takeovers, there is no actual evidence of racial animus in the State's takeovers.[370] As noted earlier, the residents of Boston voted for a mayorally-appointed board for the Boston Public Schools,[371] and in the case of the Chelsea Public Schools, it was a Boston University/Chelsea Partnership.[372]

I. Michigan

Michigan took over the Detroit Public Schools in 1999 because of management, corruption, financial, and academic problems in the district.[373] The elected school board was replaced with an appointed board, selected by the mayor and the governor.[374] Over 97% of the district's students are minorities.[375] Some people accused the State of racism in the takeover; however, no one presented actual evidence of such racial animus.[376] In 2005, however, by referendum, the State reinstated the election of board members.[377]

---

368. *Id.*; *see also* Boston Public Schools, *supra* note 366.

369. *See* New Am. Found., Fed. Educ. Budget Project, Boston Demographics, http://www.febp.newamerica.net/k12/ma/2502790 (last visited Aug. 6, 2009).

370. *See supra* notes 346-69 and accompanying text.

371. Boston Public Schools, *supra* note 366.

372. *See* Gehring, *supra* note 346; Boston Univ. Sch. of Educ., *supra* note 346.

373. *See A History of Intervention*, *supra* note 367; Assoc. Press, *Michigan Governor's Plan to Reform Detroit Schools Divides City Residents; Ditching Elected Board Looks Like Racist Power Grab, Some Are Charging*, ST. LOUIS POST-DISPATCH, Feb. 21, 1999, at A3, *available at* 1999 WLNR 949902 [hereinafter Assoc. Press, *Michigan Governor's Plan*].

374. *A History of Intervention*, *supra* note 367.

375. *See* New Am. Found., Fed. Educ. Budget Project, Detroit City School District Demographics, http://www.febp.newamerica.net/k12/mi/2612000 (last visited Aug. 6, 2009).

376. *See, e.g.*, Assoc. Press, *Michigan Governor's Plan*, *supra* note 373. In fact, the court upheld the appointed board. *See* Chastity Pratt, *Schools Case Rejected by High Court; Detroiters Challenged Takeover by the State*, DETROIT FREE PRESS, Feb. 25, 2003, n.p..

377. *See* Wilbur C. Rich, *Who's Afraid of a Mayoral Takeover of Detroit Public Schools?*, *in* WHEN MAYORS TAKE CHARGE: SCHOOL GOVERNANCE IN THE CITY 148, 159-60 (Joseph P. Viteritti ed., 2009); *see generally* CRC Memorandum, *Proposal E: Form of Governance for the Detroit Public Schools*, CITIZENS RES. COUNCIL, Sept. 2004, *available at* http://www.crcmich.org/PUBLICAT/2000s/2004/memo1077.pdf. Many problems persist in the district, however. *See, e.g.*, Diane Bukowski, *Eliminate Debt to State, Not Teachers: DPS Announces $45 Million Deficit*, MICHIGAN CITIZEN, http://michigancitizen.com/default.asp?sourceid=&smenu=1&twindow=&mad=&sdetail=6066&wpage=1&skeyword=&sidate=&ccat=&ccatm=&restate=&restatus=&reoption=&retype=&repmin=&repmax=&rebed=&rebath=&subname=&pform=&sc=1070&hn=michigancitizen&he=.com (last visited Apr. 27, 2009); Diane Bukowski, *Where Did the First Billion Go?': DPS Wants Another $2.5 Billion Bond, Community Wants DPS Audit*, MICHIGAN CITIZEN, 2007 (discussing a $45 million deficit in the district); Jennifer Mrozowski, *DPS Board Seeks Answers to Money Woes: District Officials Say Accounting Irregularities Have Existed for*

J. Mississippi

Mississippi took over the North Panola School District in 1996 due to financial crisis in the district.[378] In 1997, the State returned control to the district, with an elected board assuming office in 1998.[379] Then, in 2008, the State proceeded to take over the district again because of continuing academic problems.[380] More than 97% of the district's students are minorities.[381] Mississippi also took over the Hazlehurst City School District in 2008 due to chronic academic and financial problems in the district.[382] Over 98% of the district's students are minorities.[383] Additionally, the State took over the Jefferson Davis County School District in 2007 due to financial and academic problems in the district.[384] The district has about an 88% minority student

---

Years for Unbudgeted Teachers, DETROIT NEWS, June 6, 2008, n.p. (discussing accounting problems that persist in the district).

378. Meg Sommerfeld, *Mississippi Poised to Take over Cash-Short District*, EDUC. WK., Jan. 17, 1996, n.p. (discussing the State's initial action in 1996 to begin the takeover process); Meg Sommerfeld, *Takeover of Financially Strapped District in Miss. Sought*, EDUC. WK., Feb. 28, 1996, n.p. (noting that the North Panola district was financially troubled and that the State was moving to solve the financial troubles); Shelly Hansen, *Gov. Barbour Okays State Take Over of North Panola Schools*, http://www.wreg.com/Global/story.asp?S=8206588&nav=3HvDMIOu (last visited Apr. 19, 2009) (noting the initial financial troubles in the district and the governor's final action to initiate the takeover).

379. *See At North Panola, The State Moves in . . . and We've Been Here Before*, THE PANOLIAN, Apr. 25, 2008, at A6; *News in Brief: A National Roundup: Ex-Schools Chief Denied Job*, EDUC. WK., Dec. 10, 1997, n.p.

380. *See, e.g.* Hank M. Bounds, *State Takeover Necessary to Improve Learning Outcomes for Students*, DAILY TIMES LEADER, Sept. 11, 2008, *available at* http://www.dailytimesleader.com/content/view/82381/130/; Hansen, *supra* note 378.

381. *See* New Am. Found., Fed. Educ. Budget Project, North Panola School District Demographics, http://www.febp.newamerica.net/k12/ms/2803210 (last visited Aug. 6, 2009).

382. *See* Assoc. Press, *State May Run School System: Hazlehurst District on Track for $1M Deficit; Layoffs Possible*, COM. APPEAL (Tenn.), May 17, 2008, at 5, *available at* 2008 WLNR 9456291; Marquita Brown, *State Planning Major Hazlehurst School Overhaul*, CLARION-LEDGER (Jackson, Miss.), Sept. 18, 2008, at 1A; *State Moving to Take Over Hazlehurst Schools: District Facing Academic, Financial Problems*, WAPT CHANNEL 16 (Jackson, Miss.), May 16, 2008, http://www.wapt.com/news/16293583/detail.html.

383. *See* North Am. Found., Fed. Educ. Budget Project, Hazlehurst City School District Demographics, http://www.newamerica.net/education_budget_project/districts/hazlehurst_city_school_district#districtform-2 (last visited Apr. 19, 2009).

384. *See* Bounds, *supra* note 380; *see also* Assoc. Press, *Board of Education Expected to Suspend Ratings System*, NATCHEZ DEMOCRAT (Miss.), Apr. 18, 2008, *available at* http://natchezdemocrat.com/news/2008/apr/18/board-education-expected-suspend-ratings-system/ (noting that the Jefferson Davis County School District was taken over in 2007).

body.[385] Tunica County School District succumbed to State take over because of its academic problems.[386] The district regained control after a couple of years.[387] However, the district could face another takeover if academic deficiencies persist.[388] Ninety-eight percent of the district's students are minorities.[389] Academic problems in the Oktibbeha County School District led to Mississippi's takeover of the district in 1997.[390] Within a few years, the State declared the takeover a success, returning control to the district.[391] Approximately 91% of the district's student population is minority.[392] In 2005, the State took over the North Bolivar School District because of its financial and academic problems.[393] In 2006, the local board regained control of the district.[394] Almost all the district's students are minorities.[395] The State took over the Holmes County School District in 2006 due to the district's critical noncompliance with accreditation requirements, federal and state laws, and

---

385. *See* New Am. Found., Fed. Educ. Budget Project, Jefferson Davis County School District Demographics, http://www.febp.newamerica.net/k12/ms/2802250 (last visited Aug. 6, 2009).

386. *See, e.g.*, Stephanie Scurlock, *Mississippi Threatens Take Over if Tunica Schools Don't Improve*, WREG-TV CHANNEL 3 (Memphis, Tenn.), Nov. 30, 2007, http://www.wreg.com/global/story.asp?s=7434283 (last visited Apr. 19, 2009).

387. *Id.* (noting that the State took the district over and then "ran it" for a "couple of years").

388. *See id.* (noting the State Superintendent's comments that "if [the district does not] improve the [S]tate will take [it] over").

389. *See* New Am. Found., Fed. Educ. Budget Project, Tunica County School District Demographics, http://www.febp.newamerica.net/k12/ms/2804290 (last visited Aug. 6, 2009).

390. *See* STATE OF MISS. JOINT COMM. ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW (PEER), REPORT TO THE MISSISSIPPI LEGISLATURE: A REVIEW OF TUMICA COUNTY SCHOOL DISTRICT'S ADMINISTRATIVE AND INSTRUCTIONAL SPENDING, No. 360, at 3 (1997), *available at* http://www.peer.state.ms.us/reports/rpt360.pdf.

391. *See* Assoc. Press, *State Calls Oktibbeha Takeover a Success*, COM. APPEAL (Tenn.), Aug. 20, 1999, at A18, *available at* 1999 WLNR 4505627.

392. *See* New Am. Found., Fed. Educ. Budget Project, Oktibbeha County School District Demographics, http://www.febp.newamerica.net/k12/ms/2803420 (last visited Aug. 6, 2009).

393. *See* Alan Richard, *Mississippi Takes Control of North Bolivar District*, EDUC. WK., Jan. 4, 2006, at 4; Press Release, Miss. Dep't of Educ., Mississippi Board of Education Meets in Cleveland After Touring North Bolivar Schools (Apr. 18, 2006), *available at* http://www.mde.k12.ms.us/Extrel/news/06AprilBoard.html (noting the board of education's review of the North Bolivar district facilities after the State's November 2005 takeover of the district); Press Release, Miss. Dep't of Educ., North Bolivar Schools Taken Over by State Receive Exemplary Rating: State Takeover of School Succeeds—A Rarity Nationwide (July 27, 2006), *available at* http://www.mde.k12.ms.us/extrel/news/06NBolivarExemplary.html.

394. *See* Assoc. Press, *Shelby Schools Focus on Improving Student Achievement*, PICAYUNE ITEM (Miss.), Oct. 2, 2007, *available at* http://www.picayuneitem.com/local/local_story_275135740.html.

395. *See* New Am. Found., Fed. Educ. Budget Project, North Bolivar School District Demographics, http://www.febp.newamerica.net/k12/ms/2800720 (last visited Aug. 6, 2009).

safety, academic, and discipline problems in the district.[396] A year later, the State returned control to the local board.[397] Virtually the entire student body is compromised of minorities.[398] Ostensibly, financial, academic, and safety problems in these districts, rather than any apparent racial animus, seem to have driven the takeover decisions.[399]

K. New Jersey

Corruption, political interference, nepotism, mismanagement, and fiscal problems were some of the issues that instigated the New Jersey takeover of the Jersey City Public Schools in 1989.[400] After the takeover, the elected board took on "an advisory role."[401] In 1999, the State began the process of steadily transferring control to the district.[402] In 2007, the State Commissioner of Education recommended that control over the budget be restored to the local board and that the board be permitted to have more responsibilities.[403] Academic instruction remains under State control.[404] The district has about a 91% minority student body.[405] New Jersey took over the Newark Public Schools in 1995 because of inveterate academic problems, mismanagement, and political patronage.[406] As part of the takeover, the school board was removed.[407] In 2007, as part of the process of returning the district to local control, the State Commissioner of Education recommended that the district regain "control over

---

396. *See Conservator Named for Holmes County Schools*, AP ALERT, Mar. 17, 2006; Weekly Column of Hank Bounds, Miss. State Superintendent of Education, *Holmes County Takeover Necessary to Meet the Needs of Students* (Mar. 20, 2006), *available at* http://www.mde.k12.ms.us/extrel/news/W_Mar_20_06.html (noting misconduct issues including a student setting a carpet on fire, a fight breaking out during assembly, and a state staffer being shot at with a pellet rifle all contributing to the eventual State takeover).

397. *See Around the Region*, COM. APPEAL (Tenn.), Jan, 21, 2007, at 5.

398. *See* New Am. Found., Fed. Educ. Budget Project, Holmes County School District Demographics, http://www.febp.newamerica.net/k12/ms/2801980 (last visited Aug. 6, 2009).

399. *See supra* notes 378-97 and accompanying text.

400. *See* Lisa Jennings, *New Jersey Judge's Ruling Clears Path for State to Take over School District*, EDUC. WK., Aug. 2, 1989, n.p..

401. *See* Winnie Hu, *2 New Jersey School Districts Regain Some Local Control*, N.Y. TIMES, July 25, 2007, at B3.

402. *A History of Intervention*, *supra* note 367; Kerry A. White, *N.J. Plans to End Takeover in Jersey City*, EDUC. WK., May 26, 1999, at 1.

403. *See* Hu, *supra* note 401.

404. *See id.*

405. *See* New Am. Found., Fed. Educ. Budget Project, Jersey City Demographics, http://www.febp.newamerica.net/k12/nj/3407830 (last visited Aug. 6, 2009).

406. *See* Hu, *supra* note 401; *A History of Intervention*, *supra* note 367; White, *supra* note 402.

407. *See* Newark Public Schools, Chronological History of the Newark Schools, http://www.nps.k12.nj.us/history.html (last visited Apr. 19, 2009).

such day-to-day operations as maintaining its buildings and addressing student conduct, health and safety issues, areas in which it showed the most improvement."[408] The current elected board serves in an advisory capacity.[409] Like Jersey City Public Schools, academic instruction remains under State control.[410] This district has about a 92% minority student body.[411] The State took over the Paterson Public Schools in 1991 because of endemic academic problems and mismanagement in the district.[412] State officials removed the local board and replaced it with a state-appointed board;[413] an elected board is now in place but serves only in an advisory role.[414] The district, however, remains under State control as the State evaluates the district.[415] Nearly 95% of the district's students are minorities.[416]

The State took steps to take over the Camden Public Schools in 2002.[417] Academic and other problems in Camden fueled the State effort to take over the district.[418] A state judge ruled that the portion of the Camden Rehabilitation and

---

408. Hu, *supra* note 401.

409. *See* Newark Public Schools, District Information, http://www.nps.k12.nj.us/districtinfo.html (last visited Apr. 19, 2009) (listing the members of the elected board as "Advisory Board Members"); The Newark Public Schools, Advisory Board Members 2008-2009, http://www.nps.k12.nj.us/members.html (last visited Apr. 19, 2009) (naming the elected members as an "Advisory Board").

410. *See* Hu, *supra* note 401.

411. *See* New Am. Found., Fed. Educ. Budget Project, Newark City Demographics, http://www.febp.newamerica.net/k12/nj/3411340 (last visited Aug. 6, 2009).

412. *See* Jonathan Weisman, *Citing 'Inept' Management, N.J. Chief Targets Paterson Schools for Takeover*, EDUC. WK., Apr. 24, 1991, n.p.; *see also A History of Intervention*, *supra* note 367; Bess Keller, *Red Ink in Newark Mars State Takeover*, EDUC. WK., Feb. 2, 2000, at 1; White, *supra* note 402.

413. *See* Jonathan Weisman, *New Jersey Officials Seize Control of 'Bankrupt' Paterson Schools*, EDUC. WK., Sept. 4, 1991, n.p.

414. *See* Paterson Public Schools, http://www.paterson.k12.nj.us/boardofeducation.html (last visited Apr. 19, 2009) (listing the names of the board members); Winnie Hu, *Still Lagging, Paterson Schools Stay Under New Jersey Control*, N.Y. TIMES, Aug. 1, 2007, at B3.

415. *See* Hu, *supra* note 414; Danielle Shapiro, North Jersey.com: State Keeps Control of Paterson District, Feb. 24, 2008, http://www.northjersey.com/education/15915687.html.

416. *See* New Am. Found., Fed. Educ. Budget Project, Paterson City Demographics, http://www.febp.newamerica.net/k12/nj/3412690 (last visited Aug. 6, 2009).

417. *See* Catherine Gewertz, *News in Brief: Across the Nation: Camden, N.J., School Board Sues to Block Governance Changes*, EDUC. WK., Aug. 7, 2002, at 4 [hereinafter Gewertz, *Camden, N.J., School Board Sues*].

418. *See* Catherine Gewertz, *News in Brief: Across the Nation: N.J. Judge Blocks Takeover of Camden School Board*, EDUC. WK., Sept. 4, 2002, at 4 [hereinafter Gewertz, *N.J. Judge Blocks Takeover*]; Melanie Burney & Frank Kummer, *Cheating's Roots Deep in Camden: Citing Pressure from Above, Teachers Said It Was a Culture that Went Back at Least to the 1980s*, PHIL. INQUIRER, Dec. 17, 2006, *available at* http://www.philly.com/inquirer/education/camden_schools/camscores

Economic Recovery Act designed to give the State control of the local board was unconstitutional under the state constitutional prohibition of special legislation directed at particular districts or schools.[419] "The invalidated portion of the law would have gradually replaced the nine-member elected school board with three elected members, three chosen by the mayor, and three chosen by the governor. It also would have given the governor, a Democrat, veto power over board decisions."[420] The district has a 99% minority student population.[421] Chronic academic and financial mismanagement problems in the districts, rather than racial animus, seem to have driven these takeovers.[422]

L. New York

Academic problems and fiscal mismanagement in the Roosevelt Union Free School District provided the impetus for New York's takeover of the district in 1996.[423] The State removed the elected local board, but a few months later the State allowed election of a new board, with insignificant authority.[424] Nevertheless, the State retained control over the district.[425] Six years later, assiduous academic and fiscal problems led the State to remove the elected board again, and this time the State appointed a board to run the district.[426] The State agreed to allow election beginning in 2007,[427] but the State retains control over the district until 2011,[428] especially the power "to hire and fire the district's superintendent, veto appointments of other top administrators and principals, and sign off on district budget matters."[429] In this district, which has a virtually all-

---

17.html; *see also* The Camden Rehabilitation and Economic Recovery Act, S. 428, 210th Leg., Reg. Sess. §§ 2-3 (N.J. 2002).

419. *See* Gewertz, *N.J. Judge Blocks Takeover*, *supra* note 418.

420. *Id.*; *see also* Gewertz, *Camden, N.J., School Board Sues*, *supra* note 417. The State did take over the city of Camden itself, however, due to problems in the city. Assoc. Press, State Takeover of Camden Extended, N.J. REC., Sept. 17, 2007, at A03.

421. *See* New Am. Found., Fed. Educ. Budget Project, Camden City Demographics, http://www.febp.newamerica.net/k12/nj/3402540 (last visited Aug. 6, 2009).

422. *See supra* notes 400-421 and accompanying text.

423. Drew Lindsay, *N.Y. Regents Oust Local Board, Take Over District*, EDUC. WK., Jan. 10, 1996, at A3; *see also* Bess Keller, *News in Brief: A State Capitals Roundup: N.Y. State Eyes District Takeover*, EDUC. WK., Mar. 28, 2001, at 20.

424. *See Under State Control*, EDUC. WK., Jun 12, 1996, n.p.

425. *See id.*

426. *See* John Gehring, *News in Brief: State-Appointed Board Takes Over N.Y. District*, EDUC. WK., June 5, 2002, at 17. This takeover was enabled by Senate Bill 6617 (2002). S. 6617, Reg. Sess. (N.Y. 2002).

427. *See e.g.*, John Gehring, *N.Y. District Braces for State Takeover*, EDUC. WK., May 15, 2002; *see also* Roosevelt Sch. Dist., The Bd. of Educ., http://www.rooseveltufsd.com/rufsd/boe_information.php (last visited Apr. 20, 2009) (discussing the composition of the board).

428. *See* Gehring, *supra* note 427.

429. *Id.*

minority student body,[430] residents criticized the takeover as "an ominous blow to local control, [which] has come to symbolize the historical neglect of predominantly black districts."[431] There is no question, however, that the district had "a host of problems, such as low test scores, high dropout rates, crumbling school facilities, and the fact that few students leave school with a state regents' diploma, New York's premier high school credential."[432] Also, all members of the current board (four state-appointed and one elected by residents) are minorities.[433]

Corruption and rampant academic problems prompted the State takeover of the New York City Public Schools in 2002, vesting control in the mayor.[434] The mayor appoints eight of the thirteen-member board chaired by the city chancellor.[435] The city chancellor is appointed by the mayor, but beginning in June 2009, the city board will appoint the city chancellor.[436] The city's five borough presidents each select one of the other five members on the board.[437] In the takeover the State abolished the city's thirty-two elected community school boards.[438] Close to 86% of the district's students are minorities.[439]

M. Ohio

Ohio took over the Cleveland Public Schools in 1995 because of several significant problems in the district.[440] This was after a federal judge declared that the district was in a "state of crisis" and gave control of the district to the State.[441] The judge "ruled that internal dissension, management problems, and a crippling budget deficit had undermined the district's ability to carry out its educational

---

430. *See* New Am. Found., Fed. Educ. Budget Project, Roosevelt Union Free School District Demographics, http://www.febp.newamerica.net/k12/ny/3624990 (last visited Aug. 6, 2009).

431. Gehring, *supra* note 427. Indeed, the president of the local school board at the time of the takeover declared, "It [the takeover] was racially motivated . . . . They are saying the democratic process when it comes to black school districts takes a back seat to what the white man wants." *Id.*

432. *Id.*

433. *See* Roosevelt Sch. Dist., The Bd. of Educ.—Members, http://www.rooseveltufsd.com/rufsd/boe_members.php (last visited Apr. 20, 2009).

434. *See* Catherine Gewertz, *N.Y.C. Mayor Gains Control over Schools*, EDUC. WK., June 19, 2002, at 1.

435. *Id.*

436. N.Y. EDUC. LAW § 2590-h (McKinney 2007 & Supp. 2009).

437. *See* Gewertz, *supra* note 434.

438. *Id.*

439. *See* New Am. Found., Fed. Educ. Budget Project, New York City Public Schools Demographics, http://www.febp.newamerica.net/k12/ny/3620580 (last visited Aug. 6, 2009).

440. *See* Ann Bradley, *'Crisis' Spurs State Takeover of Cleveland*, EDUC. WK., Mar. 15, 1995, at 1 (noting that a federal judge turned control of the school over to the State of Ohio).

441. *Id.*

program."[442] In 1997, the State transferred control of the district to the mayor.[443] The State gave the mayor the power to appoint the school board members.[444] The mayor took control in 1998.[445] The National Association for the Advancement of Colored People (NAACP) expressed concern that the takeover bill "was sponsored by two white, suburban lawmakers."[446] The political liaison for the Cleveland Teachers' Union called the takeover "white colonialism."[447] There is no disputing that the district, which is over 80% minority,[448] was in a major crisis at the time of the takeover.[449] In 2002, Clevelanders voted to permanently keep mayoral appointment of the school board.[450] For a few years Ohio took over the financial operations of the Youngstown City Schools after the district was in fiscal emergency status due to chronic financial problems in the district.[451] The State of Ohio did not replace the local board.[452] About 78% of the district's students are minorities.[453]

---

442. *Id.*

443. *See* Beth Reinhard, *Bill to Give Cleveland Mayor School Control Advances*, EDUC. WK., May 21, 1997, at 12 [hereinafter Reinhard, *Bill Advances*]. This control was subsequently made possible by House Bill 269. H.B. 269, 122d Legis., Reg. Sess. (Ohio 1998); *see also* Caroline Hendrie, *Plan Gives Mayor Control Over Cleveland Schools*, EDUC. WK., Oct. 9, 1996, at 3; Beth Reinhard, *Mayor to Get School Control in Cleveland*, EDUC. WK., July 9, 1997, at 1; Kerry A. White, *Mayor to Control Cleveland Schools After Judge Ends State Intervention*, EDUC. WK., Aug. 5, 1998, at 4.

444. White, *supra* note 443.

445. *Id.*

446. Reinhard, *Bill Advances*, *supra* note 443; *see also* Beth Reinhard, *Lawsuits Oppose Mayor's Role in Cleveland Schools*, EDUC. WK., Sept. 17, 1997, at 3 (noting race-based challenges to the bill).

447. Reinhard, *Bill Advances*, *supra* note 443. According to a former candidate for the school board, "When you've got black people in charge and a majority-black district, people think they don't know what they're doing . . . . It's really insulting." *See* Reinhard, *Racial Issues*, *supra* note 11.

448. *See* New Am. Found., Fed. Educ. Budget Project, Cleveland Municipal School District Demographics, http://www.febp.newamerica.net/k12/oh/3904378 (last visited Aug. 6, 2009).

449. *See supra* notes 440-48 and accompanying text.

450. *See* Martha T. Moore, *More Mayors Move to Take Over Schools*, USA TODAY, Mar. 20, 2007, *available at* http://www.usatoday.com/news/education/2007-03-20-cover-mayors-schools_N.htm; *see also* Catherine Gewertz, *Clevelanders to Weigh in on Mayoral Control of Schools*, EDUC. WK., Oct. 30, 2002, at 8 [hereinafter Gewertz, *Clevelanders to Weigh in*] (noting the then upcoming ballot decision of whether to retain mayoral control).

451. *See* Caroline Hendrie, *State Declares Fiscal Emergency in Cleveland Schools*, EDUC. WK., Nov. 6, 1996, at 3.

452. *See id*; *see generally* Youngstown City Schools, http://www.ycsd.k12.oh.us/ (last visited Apr. 19, 2009).

453. *See* New Am. Found., Fed. Educ. Budget Project, Youngstown City School District Demographics, http://www.febp.newamerica.net/k12/oh/3904516 (last visited Aug. 6, 2009).

N. Pennsylvania

Pennsylvania took over the Chester-Upland School District in 1994 after declaring the district financially distressed.[454] In 2000, the State also declared the district educationally distressed due to its mounting academic problems and appointed a three-member panel to run the district.[455] In 2007, based on financial improvements in the district, the State removed the district from fiscal distress status.[456] However, given the district's persisting academic problems, the State appointed an empowerment board to control the district's academics.[457] This district's student body is approximately 98% minority.[458]

The State took over the School District of Philadelphia in 2001 because of financial and academic problems in the district.[459] The State then contracted with various groups, including Edison Schools Incorporated and Temple University, to run several of the district's schools.[460] The district, however, is run by a state-appointed panel known as the School Reform Commission.[461] Three of the

---

454. *See* Catherine Gewertz, *It's Official: State Takes Over Philadelphia Schools*, EDUC. WK., Jan. 9, 2002, at 1 [hereinafter Gerwetz, *It's Official*]; Caroline Hendrie, *Panel Proposes Breaking up Phila. District*, EDUC. WK., Jan. 19, 1998, at 1; Robert C. Johnston, *Edison to Study Woes of Philadelphia Schools*, EDUC. WK., Aug. 8, 2001, at 3 [hereinafter Johnston, *Edison to Study Woes*]; Robert C. Johnston, *Pa. Targets 11 Districts for Takeover*, EDUC. WK., May 17, 2000, at 1; *see also A History of Intervention*, *supra* note 367.

455. *See* sources cited *supra* note 454.

456. *See* Press Release, Pa. Dep't of Educ., Secretary of Education Removes Chester Upland School District from Fiscal Distress, Appoints Empowerment Board (Mar. 8, 2007), *available at* http://www.pdenewsroom.state.pa.us/newsrooms/cwp/view.asp?a=3&q=125660.

457. *Id.*

458. *See* New Am. Found., Fed. Educ. Budget Project, Chester-Upland School District Demographics, http://www.febp.newamerica.net/k12/pa/4205860 (last visited Aug. 6, 2009).

459. *See* Gewertz, *It's Official*, *supra* note 454; Catherine Gewertz, *State Review Panel Weighs in on Progress of Phila. Schools*, EDUC. WK., Apr. 6, 2005, n.p.

460. *See* Rick Ahl, *Edison Schools and the Philadelphia School District*, BROWN POL'Y REV., Fall 2006, n.p.; *What Helped Philadelphia?: Study Prompts Debate on Role of Outside Groups in Schools*, EDUC. WK., Feb. 12, 2007, at 5; Gewertz, *It's Official*, *supra* note 454; Catherine Gewertz, *Phila. to Keep Outside School Managers One More Year*, EDUC. WK., June 28, 2007, n.p.; Catherine Gewertz, *Phila. Lines up Outside Groups to Run Schools*, EDUC. WK., Aug. 7, 2002, at 1; Karla Scoon Reid, *Groups Named to Lead Dozens of Ailing Phila. Schools*, EDUC. WK., Apr. 24, 2002, at 10; Katrina Trinko, *Report: EMO School Students Improved at Faster Rate than School District Students*, THE BULLETIN, July 11, 2008, n.p.; Press Release, Edison Schools, Edison Schools Disputes Flawed Findings in Philadelphia Report: Facts Show Multiple Provider Model Has Dramatically Improved Philadelphia Schools (Feb. 1, 2007), *available at* http://www.edisonschools.com/edison-schools/edison-news/edison-schools-disputes-flawed-findings-in-philadelphia-report; *see also* Nat'l Council of Educ. Providers, Edison School, Inc., http://www.educationproviders.org/members/ edison/htm (last visited Apr. 20, 2009).

461. *See* School Reform Commission—The School District of Philadelphia, http://www.

commission members are appointed by the governor with the mayor appointing the other two.[462] Over 86% of the district's students are minorities.[463]

Sundry problems in the district, including misappropriation of funds, missing district properties, incompetence, declining enrollment, patronage, and ostensibly criminal activities prompted the State's takeover of the Harrisburg School District in 2000.[464] The board of control, appointed by the mayor, runs the district under the direction of the mayor.[465] However, there is also a local elected board whose members meet once a year to approve tax plans.[466] Just under 95% of the district's student population are minorities.[467] Declining enrollment and fiscal crisis led to the State's appointment of a board of control for the Duquesne City School District in 2000.[468] The district's only high school was closed in 2007 as persisting fiscal challenges made continued operation of the high school infeasible.[469] Students now attend high school in the West Mifflin Area and East Allegheny school districts.[470] More than 93% of the district's students are minorities.[471]

---

phila.k12.pa.us/src/ (last visited Apr. 20, 2009).

462. *See* 24 PA. CONS. STAT. § 6-696 (West 1992 & Supp. 2008); BROWN UNIVERSITY, ANNENBERG INST. PHILADELPHIA 1, *available at* http://www.annenberginstitute.org/pdf/EKF06_Philadelphia.pdf (last visited Apr. 20, 2009); *see also* School Reform Commission, *supra* note 461.

463. *See* New Am. Found., Fed. Educ., Budget Project, Philadelphia City School District Demographics, http://www.febp.newamerica.net/k12/pa/4218990 (last visited Aug. 6, 2009).

464. *See* Jessica L. Sandham, *Mayoral Takeover of Schools off to Tumultuous Start in Pa. Capital*, EDUC. WK., Jan. 10, 2001, at 5.

465. *See id.* ("[T]he mayor appointed a new five-member board of control, which quickly moved into administrative offices equipped with different locks and new computer-access codes."); *see also* Brian Baker, *Stephen Reed: Mayor of Harrisburg*, U.S. CITY MAYORS, July 13, 2006, *available at* http://www.citymayors.com/mayors/harrisburg_mayor.html; Harrisburg School District, Board Members, http://www.hbgsd.k12.pa.us/2043906322912/site/default.asp (listing the members of the board of control).

466. *See* J.D. LaRock, *Harrisburg: A Mayor Making Strides in Public Education*, U.S. MAYOR NEWSPAPER, July 14, 2003, *available at* http://www.usmayors.org/uscm/us_mayor_newspaper/documents/07_14_03/harrisburg.asp; Harrisburg School District, *supra* note 465 (listing members of the board of directors).

467. *See* New Am. Found., Fed. Educ. Budget Project, Harrisburg City School District Demographics, http://www.febp.newamerica.net/k12/pa/4211580 (last visited Aug. 6, 2009).

468. *See* Press Release, Pa. Dept. of Educ., Distinguished Educator Audrey Utley Named to Lead Duquesne Board of Control (Mar. 17, 2008), *available at* http://www.pdenewsroom.state.pa.us/newsroom/cwp/view.asp?Q=139184&A=3.

469. Celanie Polanick, *When the State Steps in: Boards of Control*, VALLEY NEWS DISPATCH (Pa.), Mar. 30, 2008, *available at* http://www.pittsburghlive.com/x/pittsburghtrib/news/print_559802.html.

470. *Id.*

471. *See* New Am. Found., Fed. Educ. Budget Project, Duquesne City School District Demographics, http://www.febp.newamerica.net/k12/pa/4208010 (last visited Aug. 6, 2009).

Due to financial problems, the State has control of the Clairton City School District a few times, with the first ending in 1988[472] and another for six years ending in 1999.[473] The district is now under local control.[474] Approximately 67% of the students in the district are minorities.[475] The State also placed the Sto-Rox School District under a board of control in 1992 due to financial troubles in the district.[476] Pennsylvania returned this district to local control in 1999.[477] A history of academic problems led to State control of the district again in 2000.[478] About 41% of Sto-Rox School District's students are minorities.[479] The districts taken over in Pennsylvania all had apparent academic and or financial problems and it would be difficult for anyone to make a valid case that racial animus motivated the decisions.[480]

O. Rhode Island

Rhode Island took over the Central Falls School District in 1991 because of growing fiscal problems in the district.[481] In fact, this district asked that the State take over, becoming the first district to do so in the nation.[482] A tentative agreement giving the State control was signed in 1991, with the State assuming

---

472. *See* Karen Diegmueller, *Hard Times*, EDUC. WK., Nov. 24, 1993, at 1; Press Release, Pa. Assoc. of Rural and Small Schs., Equity Suit Updates from the Courtroom: Day 2 (Jan. 7, 1997), *available at* http://www.parss.org/_trial/day02.asp.

473. *See* Eleanor Chute, *A Chance for Change: Rebuilding a School District Means Changing the 'Duquesne Way,'* PITT. POST-GAZETTE, Feb. 19, 2001 *available at* http://www.post-gazette.com/regionstate/20010219duquesnedaytworeg2.asp; Diegmueller, *supra* note 472; Rona Kobell, *Clairton, Sto-Rox School Districts Are Taken off the 'Distressed' List*, PITT. POST-GAZETTE, Feb. 19, 1999, *available at* http://www.post-gazette.com/regionstate/19990219distressed7.asp; Duquesne City: Special Board Named to Deal with Distressed School District, TROUBLED CO. REPORTER, Oct. 16, 2000, *available at* http://bankrupt.com/TCR_Public/001016.MBX.

474. *See* Brian David, *State Official Calls for Financial Incentives to Merge School Districts*, PITT. POST-GAZETTE, Mar. 8, 2007, *available at* http://www.post-gazette.com/pg/07067/767653-54.stm; *see generally* Clairton City School District, http://www.clairton.k12.pa.us (last visited Apr. 20, 2009).

475. *See* New Am. Found., Fed. Educ. Budget Project, Clairton City School District Demographics, http://www.febp.newamerica.net/k12/pa/4206030 (last visited Aug. 6, 2009).

476. *See* Kobell, *supra* note 473.

477. *Id.*

478. *See* Brian David, *Troubled District Still Can Offer Excellence, Superintendent Says*, PITT. POST-GAZETTE, Sept. 6, 2007, *available at* http://www.post-gazette.com/pg/07249/814877-57.stm.

479. *See* New Am. Found., Fed. Educ. Budget Project, Sto-Rox School District Demographics, http://www.febp.newamerica.net/k12/pa/4222830 (last visited Aug. 6, 2009).

480. *See supra* notes 454-79 and accompanying text.

481. *See* Karen Diegmueller, *Troubled R.I. District Becomes First to Request State Takeover*, EDUC. WK., Apr. 3, 1991, n.p.

482. *Id.*

full control a year later.[483] The district remains under state control.[484] Over 80% of the district's students are minorities.[485]

P. South Carolina

Academic problems in the Allendale County School District led to the 1999 South Carolina takeover of the district.[486] At first a few people in the district opposed the takeover, with one person referring to the State Superintendent as "Hitler."[487] However, at a community meeting on the takeover, most of those present did not question the takeover.[488] Additionally, a detailed report revealing that this district had so many Byzantine problems, including chronically low test scores and ineffective leadership, was difficult to dispute.[489] In 2007, the State returned the district to local control.[490] Over 96% of the district's students are minorities.[491]

Q. Texas

Texas intervened in the Somerset Independent School District in 1995 as a result of the State fearing that mismanagement on the part of the district's superintendent would lead to turmoil and violence.[492] In the same year, the State returned the district to local control.[493] Some believe that protests and

---

483. *Id.*

484. *See* William R. Holland, Letter to the Editor, *Central Falls Schools Still Need Help*, PROVIDENCE J., Apr. 29, 2007, *available at* http://www.projo.com/opinion/letters/content/CT_holland29_04-29-07_3F593H9.168bba3.html (letter from interim superintendent outlining the continuing issues and the continuing State control); *see generally* Central Falls School District, www.cfschools.net (last visited Apr. 20, 2009).

485. *See* New Am. Found., Fed. Educ. Budget Project, Central Falls School District Demographics, http://www.febp.newamerica.net/k12/ri/4400120 (last visited Aug. 6, 2009).

486. *See* Alan Richard, *Starting from Scratch*, EDUC. WK., Oct. 13, 1999, at 30.

487. *Id.*

488. *See id.*

489. *Id.*

490. *See* Diette Courrégé, *Allendale Gets Its Schools Back*, CHARLESTON POST & COURIER, July 27, 2007, *available at* http://www.charleston.net/news/2007/jul/22/allendale_gets_its_schools_back11178/?print; *see also State Won't Take Over Allendale Schools Again*, AP ALERT, July 10, 2008. Problems persist in the district but in July 2008 the state superintendent opted not to takeover the district again, though he did leave open the possibility. *Id.* He did add, however, that takeover of districts would be a last resort. *Id.*

491. *See* New Am. Found., Fed. Educ. Budget Project, Allendale County School District Demographics, http://www.febp.newamerica.net/k12/sc/4500750 (last visited Aug. 6, 2009).

492. *See* Cindy Ramos, *TEA Takes Over Somerset—Fearing Violence, Agency Steps in to Monitor Troubled District*, SAN ANTONIO EXPRESS-NEWS, Feb. 22, 1995, at 1A, *available at* 1995 WLNR 5430810.

493. *See* Cindy Ramos, *TEA Bows out at Somerset—Control of Embattled School District to*

challenges, fueled by the State taking away control from the elected board, sparked the brevity of the State takeover.[494] However, the State explained the brevity as a response to quick improvements made in the few months of the takeover.[495] The district has about an 84% minority student body.[496]

The State also took over Wilmer-Hutchins Independent School District in 1996 because of cronyism, mismanagement, and academic and fiscal problems.[497] The State appointed a management team for the district.[498] The district regained control in 1998.[499] However, problems persisted in the district, including sexual harassment allegations forcing a superintendent to resign,[500] State investigations of inaccurate data on dropouts,[501] low academic achievement,[502] and abysmal financial crisis,[503] leading the state comptroller to implore the district to ask for a State takeover.[504] The Federal Bureau of Investigation (FBI), the district's police department, Dallas County's district attorney, and the Texas Rangers commenced investigations into the district's spending and fiscal mismanagement[505] and document tampering in a criminal investigation, even leading to grand jury indictments.[506]

Be Passed to New Board, SAN ANTONIO EXPRESS-NEWS, May 6, 1995, at 1C, *available at* 1995 WLNR 5432087.

494. *See id.* (noting among other issues, three lawsuits filed against the Texas Education Agency).

495. *Id.*

496. *See* New Am. Found., Fed. Educ. Budget Project, Somerset Independent School District Demographics, http://www.febp.newamerica.net/k12/tx/4840740 (last visited Aug. 6, 2009).

497. *See* Caroline Hendrie, *Ill Will Comes with Territory in Takeovers*, EDUC. WK., June 12, 1996, at 1 (discussing the problems that led to the eventual takeover); Jen Sansbury, *DeKalb's Finalist for Superintendent in Alabama, Brown Wins Over Detractors*, ATL. J.-CONST., Mar. 4, 2002, at B1, *available at* 2002 WLNR 4647379 (mentioning the 1996 Texas Education Agency's takeover of Wilmer-Hutchins).

498. *See* Sansbury, *supra* note 497.

499. *See Not Measuring up: A Look at Wilmer-Hutchins ISD*, DALLAS MORNING NEWS, http://www.dallasnews.com/sharedcontent/dws/img/08-04/0822wh.pdf (last visited Apr. 20, 2009) [hereinafter *Not Measuring up*]; Jim Watts, *Texas: School Takeover Seen*, BOND BUYER, Nov. 9, 2004, at 31 [hereinafter Watts, *Texas: School Takeover*].

500. *Not Measuring up*, *supra* note 499.

501. *Id.*

502. *See* Jim Watts, *Texas Officials Close Wilmer-Hutchins ISD*, BOND BUYER, June 29, 2005, at 4 [hereinafter Watts, *Texas Officials Close*] (noting low test scores and allegations of teacher's assisting students in cheating on exams).

503. *See Texas News Briefs: State Paving Way for Possible Takeover of Troubled District*, AP ALERT, Aug. 31, 2004; Watts, *Texas Officials Close*, *supra* note 502.

504. *See Not Measuring up*, *supra* note 499.

505. *See* Jim Watts, *School District Bond Election Scheduled Despite Investigation*, BOND BUYER, Sept. 13, 2004, at 43.

506. *See* Watts, *Texas: School Takeover*, *supra* note 499.

Due to enduring problems in the district, the State again appointed a management team to oversee the district in 2004.[507] However, the management team and the elected board, which was retained, were unable to work together.[508] This, coupled with revelations of teacher-assisted student cheating on the state test, culminated in the State's 2005 appointment of a board of managers to replace the elected school board.[509] In the same year, in closing the district, the State-appointed board maintained that it would only reopen if voters approved huge property tax hikes and a bond proposal for rebuilding schools in the district.[510] The voters overwhelmingly defeated these measures, prompting the State Commissioner of Education to call for the annexation of the district to the Dallas Independent School District[511] which is about 95% minority.[512] The annexation, characterized by *The Dallas Morning News* as "the district's state-induced euthanasia"[513] occurred in 2006.[514] Approximately 96% of the Wilmer-Hutchins district's student body was minority.[515]

R. West Virginia

Low attendance, poor academic performance, and administrative mismanagement were among the factors that sparked West Virginia's takeover of the Logan County Schools in 1992.[516] The State retained the elected local board but with diminished responsibilities.[517] For example, the board had power

---

507. *See* Press Release, Tex. Educ. Agency, Board of Managers and New Superintendent to be Installed in Wilmer-Hutchins ISD (May 12, 2005), *available at* http://www.tea.state.tx.us/press/whmanagers.html [hereinafter Press Release, Board of Managers].

508. *Id.* For twenty years, the State had appointed management teams over the district several times but the elected board was essentially retained. *Id.*

509. *See* Watts, *Texas Officials Close*, *supra* note 502; Press Release, Board of Managers, *supra* note 507.

510. Watts, *Texas Officials Close*, *supra* note 502.

511. *See* Press Release, Tex. Educ. Agency, Commissioner Orders Annexation of Wilmer-Hutchins to Dallas ISD, Effective July 2006 (Sept. 2, 2005), *available at* http://www.tea.state.tx.us/press/wilmerhutchinsannex.html.

512. *See* New Am. Found., Fed. Educ. Budget Project, Dallas Independent School District Demographics, http://www.febp.newamerica.net/k12/tx/4816230 (last visited Aug. 6, 2009).

513. Joshua Benton, *A Call for Wilmer-Hutchins' Reopening: Group Seeks to Revive Fallen District, Says Area Deserves Its Own Schools*, DALLAS MORNING NEWS, July 2, 2007, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/070207dnmetwilmeryear.377659b.html.

514. *Id.*

515. *See Not Measuring up*, *supra* note 499.

516. *See* Sally K. Gifford, *W. Va. Board Assumes Control of District for 1st Time*, EDUC. WK., Sept. 9, 1992, n.p.; David J. Hoff, *W. Va. Leaves District Better Than It Found It*, EDUC. WK., Sept. 18, 1996, at 17.

517. Hoff, *supra* note 516.

over maintenance and transportation,[518] while the State was responsible for "personnel, curriculum budget, and school calendar."[519] Keeping the elected board in place helped minimize local opposition to the takeover.[520] In 1995, the local board regained control over the school calendar and the budget.[521] Finally, in 1996, the State restored full control of the district to the local board.[522] Over 96% of the district's students are white.[523]

In 2000, West Virginia took over the Lincoln County School District after the State found fiscal, academic, and personnel problems in the district.[524] The State retained the local board but the significant responsibilities for the district were vested in the State.[525] Nearly 100% of the district's students are white.[526] The State took over the Mingo County Schools in 1998;[527] a review found "a total of 172 deficiencies in Mingo County school operations,"[528] including "budget deficits, low student achievement and a lack of leadership."[529] The State restored control to the elected board in December 2002.[530] However, in 2005, the State took over the district once again, this time because of its failure to agree with the school consolidation program put forth by the State.[531] Approximately 3% of the district is minority.[532] Fiscal and personnel problems, as well as mismanagement,

---

518. *Id.*

519. *Id.*

520. *See id.*

521. *Id.*

522. *Id.*

523. *See* New Am. Found., Fed. Educ. Budget Project, Logan County School District Demographics, http://www.febp.newamerica.net/k12/wv/5400690 (last visited Aug. 6, 2009).

524. *See* Bess Keller, *West Virginia Seizes Control of Its Third School District*, EDUC. WK., June 21, 2000, at 22.

525. *Id.*

526. *See* New Am. Found., Fed. Educ. Budget Project, Lincoln County School District Demographics, http://www.febp.newamerica.net/k12/wv/5400660 (last visited Aug. 6, 2009).

527. *See* Dianne Weaver, *ED-WATCH: State Takes Over Hampshire Schools*, HUR HERALD (W. Va.), Jan. 25, 2006, *available at* http://www.hurherald.com/cgi-bin/db_scripts/articles?Action=user_view&db=hurheral_articles&id=17808; Press Release, W. Va. Dep't of Educ., Mingo County Regains Control of School System (Dec. 11, 2002), *available at* http://wvde.state.wv.us/news/539 [hereinafter Press Release, Mingo County Regains Control].

528. Weaver, *supra* note 527.

529. *See* Press Release, Mingo County Regains Control, *supra* note 527.

530. *See* Jim Lees, *The Mingo County School Takeover*, THE LEG.: W. VA. SCH. BDS. ASSOC., Nov. 30, 2005, at 20; Press Release, Mingo County Regains Control, *supra* note 527.

531. Weaver, *supra* note 527; *see also* Alan Richard, *West Virginia Governor Cool to School Consolidation*, EDUC. WK., April 13, 2005, at 28; Press Release, W. Va. Dep't of Educ., Supreme Court Upholds State Intervention in Mingo County (Oct. 10, 2006), *available at* http://wvde.state.wv.us/news/1294.

532. *See* New Am. Found., Fed. Educ. Budget Project, Mingo County School District Demographics, http://www.febp.newamerica.net/k12/wv/5400900 (last visited Aug. 6, 2009).

led to West Virginia's takeover of the Hampshire County Schools in 2006.[533] A year later, the State returned control of the district to the elected board.[534] Approximately 2% of the district's students are minorities.[535]

A request for a State takeover by district leadership as well as a 144-page report from state auditors prompted West Virginia to take over the McDowell County Schools in 2001.[536] Among other things, the report revealed unsafe conditions presenting danger to students and staff as well as a lack of quality education in the district.[537] According to the report, "'extraordinary circumstances exist[ed] in the county that constitute[d] major impediments to the provision of education programs and services.'"[538] In fact, district leadership declared that they were no longer able to run the district.[539] The minority student body of the district is 12%.[540]

III. STATE TAKEOVERS OF MINORITY DISTRICTS AND THE EQUAL PROTECTION CLAUSE

In Part II, we explained that the majority of district takeovers across the country are minority districts. In some cases, minority groups have alleged that the takeovers were racially motivated. In many cases, there was evidence of financial mismanagement and incompetence on the part of the minority districts. Furthermore, many of the takeovers were fraught with tension and ill-will. These negative feelings could easily lead to future litigation. Thus, this Part analyzes the viability of Equal Protection Clause challenges to minority districts under the Federal Constitution.

---

533. *See* Press Release, W. Va. Dep't of Educ., Hampshire County Schools to Return to Local Control (May 10, 2007), *available at* http://wvde.state.wv.us/news/1427/.

534. *Id.* (quoting the auditor's report).

535. *See* New Am. Found., Fed. Educ. Budget Project, Hampshire County School District Demographics, http://www.febp.newamerica.net/k12/wv/5400420 (last visited Aug. 6, 2009).

536. *See* Lisa Fine, *Troubled West Virginia District Invites State to Take Over*, EDUC. WK., Nov. 21, 2001, at 9.

537. *See* Press Release, W. Va. Dep't of Educ., State Board of Education Takes Control of McDowell County School System (Nov. 8, 2001), *available at* http://wvde.state.wv.us/news/383/.

538. *Id.* (quoting the auditor's report).

539. *See* Fine, *supra* note 536.

540. *See* New Am. Found., Fed. Educ. Budget Project, McDowell County School District Demographics, http://www.febp.newamerica.net/k12/wv/5400810 (last visited Aug. 6, 2009). The Lincoln, McDowell, and Mingo County Schools appear to remain under State control as of this writing. *See* W. Va. Dep't of Educ., Meeting Minutes (Apr. 10, 2008), *available at* http://wvde.state.wv.us/boe-minutes/2008/wvbeminutes041008.html (noting the State Superintendent's Report on the three districts under State control); W. Va. Dep't of Educ., Meeting Minutes (May 15, 2008), *available at* http://www.wv.us/2008/wvbeminutes051508.html (noting the State Superintendent's Report of continued evaluation of the three districts); W. Va. Dep't of Educ., Meeting Minutes (Aug. 14, 2008), *available at* http://wvde.state.wv.us/wvbeminutes081408.html.

A. The Equal Protection Clause Generally

The Equal Protection Clause of the Fourteenth Amendment states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[541] A review of cases alleging violation of the Equal Protection Clause could be subject to one of three standards of review: strict scrutiny, intermediate scrutiny,[542] and rational basis.[543] The strict scrutiny standard of review is only applied when government action results in a classification that "interferes with a 'fundamental right' or discriminates against a 'suspect class.'"[544] To withstand muster under the strict scrutiny standard of review, the burden is on the government to show that the classification is narrowly tailored to achieve a compelling state interest.[545] The United States Supreme Court has recognized race as a suspect class[546] and the right to vote as a fundamental right.[547] The rational basis standard of review is the most lenient standard of review. Under this standard of review, the Equal Protection Clause is violated only if the classification is not rationally related to a legitimate state interest.[548] Rational basis review is applied when a classification is neither based

---

541. U.S. CONST. amend. XIV, § 1 cl. 4.

542. The intermediate scrutiny standard of review is less stringent than the strict scrutiny standard of review but more stringent than the rational basis review standard. Under this standard of review, the government has to show that its classification promotes a substantial State interest. This level of scrutiny is applied to quasi-suspect classifications based on gender and illegitimacy. *See* Clark v. Jeter, 486 U.S. 456, 461-63 (1988) (applying strict scrutiny in a case involving illegitimacy); Plyler v. Doe, 457 U.S. 202, 218 n.16, 224 (1982) ("[T]he discrimination [against children of illegal aliens in the state statute] can hardly be considered rational unless it furthers some substantial goal of the State."); Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."). Since neither gender or illegitimacy are involved here, we do not focus on this tier of review.

543. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-59 (1988) (discussing and outlining the tests for strict scrutiny and rational basis review).

544. *Id.* at 457.

545. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

546. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court declared that "all legal restrictions which curtail the civil rights of a single racial group are *immediately suspect*. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny." *Id.* at 216 (emphasis added). The reference to "most rigid scrutiny" is a reference to "strict scrutiny." *See* Natasha L. Carroll-Ferrary, Note, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated,"* 51 N.Y.L. SCH. L. REV. 595, 601 (2006-2007).

547. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) ("[T]he right to vote is too precious, too *fundamental* to be so burdened or conditioned."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (dicta).

548. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes

on fundamental rights nor suspect classes; the classification will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[549]

B. Equal Protection and State Takeovers

Critics of the appointive system of selecting school board members that often accompanies takeovers of districts claim the system violates the Equal Protection Clause and is subject to the strict scrutiny standard of review for racial classification and infringement of the fundamental right to vote.[550] The United States Supreme Court has stated, however, that territorial uniformity is not a constitutional requirement under the Equal Protection Clause.[551] Specifically, the Court declared that "[t]he Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state."[552] Consequently, the Equal Protection Clause is not violated merely because residents of minority school districts cannot vote for school boards due to an otherwise legitimate State takeover of the district, while white majority school districts in the same state retain the right to vote for their school board members.[553] As far back as 1961, Chief Justice Warren stated, "[W]e have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite."[554]

The United States District Court for the District of Maryland held similarly in *Welch v. Board of Education*.[555] In that case residents of eight county school districts challenged a Maryland statute that provided for an appointed school board in Baltimore County, while elected school boards were allowed in eight of the twenty-three counties in Maryland.[556] The federal district court found that the classification was not suspect and did not interfere with a fundamental right.[557] Thereupon, the court ruled that strict scrutiny was inapplicable, and instead it applied the rational basis standard of review in upholding the classification.[558] The *Welch* court relied on the United States Supreme Court's holding in *Sailors*

---

fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

549. *Id.*

550. *See* Alicia Sikkenga, Note, *Detroit School Reform: A Necessary Means to Improve the Schools and End the Cycle of Mismanagement*, 77 U. DET. MERCY L. REV. 321, 325 (2000).

551. Fort Smith Light & Traction Co. v. Bd. of Improvement, 274 U.S. 387, 391 (1927).

552. *Id.*

553. *See id.*

554. McGowan v. Maryland, 366 U.S. 420, 427 (1961).

555. 477 F. Supp. 959 (D. Md. 1979).

556. *Id.* at 964.

557. *Id.*

558. *Id.* at 964-65.

v. Board of Education (*Sailors II*)[559] to determine whether there is a fundamental right to vote for school board members.[560]

In *Sailors v. Board of Education* (*Sailors I*),[561] the plaintiffs brought suit challenging the statutory system of selecting the members of the Kent County Board of Education as violating the Equal Protection Clause.[562] The plaintiffs also alleged that the statute violated the one person, one vote principle[563] by giving one vote to each school district despite the wide variations in the populations of the school districts.[564] At the time, Michigan Code provided that each school district within the county had one vote in the selection of members of the county boards of education, irrespective of population.[565] While the residents of each school district could vote for the district's school board, they could not vote for the county school board.[566] Instead, a delegate chosen from among the elected members of each district's school board voted for the county school board members.[567] The members of the county school board did not have to be members of any of the school districts' school boards.[568] The county boards had ample powers, including power to levy property taxes, gather data on delinquent taxes, prepare an annual budget, transfer territory from one school district to another, and direct the special education programs.[569]

On appeal, the United States Supreme Court declared that "'[p]olitical subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental function.'"[570] The Court went on to note that counties, local boards, and other political subdivisions of the state exist at the pleasure of the State.

> "[T]hese governmental units 'are created as convenient agencies for exercising such of the governmental powers of the state, as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the absolute discretion of the state.'"[571]

---

559. 387 U.S. 105 (1967).

560. *Welch*, 477 F. Supp. at 964-65.

561. 254 F. Supp. 17 (W.D. Mich. 1966), *aff'd*, 387 U.S. 105 (1967).

562. *Id.* at 18.

563. *See generally* Reynolds v. Sims, 377 U.S. 533 (1964) (establishing the one person, one vote principle as a matter of constitutional law).

564. *Sailors I*, 254 F. Supp. at 18.

565. *See id.* (citing Mich. Comp. Laws §§ 340.291-340.330x (repealed 1977)).

566. *Id.*

567. *Id.* at 18-19; Sailors v. Bd. of Educ. (*Sailors II*), 387 U.S. 105, 106-07 (1967).

568. *See id.*

569. *Sailors I*, 254 F. Supp. at 19.

570. *Sailors II*, 387 U.S. at 107-08 (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)).

571. *Id.* at 108 (quoting *Reynolds*, 377 U.S. at 575).

Courts examining Equal Protection Clause challenges similar to those in *Welch* and *Sailors II* would conclude that appointive systems do not violate the Equal Protection Clause.[572] In reaching this holding, courts would likely rely on the following holding from *Sailors II*: "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election."[573] In essence, the Court ruled that there was no fundamental right to vote for school board members.[574] The Court held that the functions of the county boards were administrative in nature and declined to rule on whether it would find an Equal Protection Clause violation if a local legislative body (as opposed to an administrative body) is selected through an appointive instead of an elective system.[575] It is likely, however, that the more similar the functions of a local school board are to those of the county board in *Sailors I*, the more likely courts are to find the board to be of a nonlegislative nature and, thus, apply the *Sailors II* holding.[576]

Building on the above reasoning, the Supreme Court held that there is no fundamental right to vote for local school boards.[577] The Court applied rational basis review, rather than strict scrutiny.[578] Surprisingly, the Court applied this more lenient standard in spite of the fact that in precedent the Court had declared the right to vote a fundamental right preservative of all other rights.[579] It must be noted that in precedent, the Court ruled that the Federal Constitution protects the right to vote in federal and state elections.[580] However, a key distinction arises from the fact that the right to vote in *local* elections is the State's prerogative,[581]

---

572. *See, e.g.*, Moore v. Detroit Sch. Reform Bd., 2002 FED App. 0204P, 293 F.3d 352, 368-72 (6th Cir.); Mixon v. Ohio, 1999 FED App. 0347P, 193 F.3d 389, 402-06 (6th Cir.); *see also* Mark Walsh, *High Court Declines Challenge to Appointed Detroit Board*, EDUC. WK., Mar. 5, 2003, at 29 (noting that the U.S. Supreme Court refused to hear *Moore* on certiorari, suggesting a potential agreement with the *Welch* and *Sailors II* reasoning as applied to takeovers).

573. *Sailors II*, 387 U.S. at 108.

574. *See id.* at 110-11 (stating that "[s]ince the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy"); *see also Mixon*, 193 F.3d at 403 ("Although Plaintiffs have a fundamental right to vote in elections before them, there is no fundamental right to elect an administrative body such as a school board, even if other cities in the state may do so.").

575. *Sailors II*, 387 U.S. at 111.

576. *See* Van Zanen v. Keydel, 280 N.W.2d 535, 537-39 (Mich. Ct. App. 1979) (declining to limit *Sailors II* to solely administrative functions, and *Sailors II*'s holding applying to a metropolitan authority).

577. *See Sailors II*, 387 U.S. at 111.

578. *Id.*

579. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 560-62 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 369-71 (1886).

580. *Reynolds*, 377 U.S. at 554-77.

581. *See id.* Indeed in *Reynolds*, the Court specifically referred to the fundamental right to

as local governmental entities, "[p]olitical subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities."[582] They are merely "'created as *convenient* agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature and duration of the powers conferred upon (them) . . . and the territory over which they shall be exercised rests in the *absolute discretion of the state*.'"[583] Nevertheless, where there is an election in place, during the existence of such an elective system, "a citizen has a constitutionally protected right to participate in elections on an *equal* basis with other citizens *in the jurisdiction*."[584] As explained further by the Court, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[585] In other words, if the jurisdiction or electorate is the school district, every citizen in that district has a right to participate equally in the elections *while* an elective system exists in that district.[586] Essentially, there is a fundamental right to equal access to participation in elections.[587]

Under rational basis review the Supreme Court in *Sailors II* upheld the

---

vote with respect to state and federal elections. *Id.* With respect to local elections, the Court added in *Sailors II*, that

> [i]f we assume arguendo that where a State provides for an election of a local official or agency—whether administrative, legislative, or judicial—the requirements of *Gray v. Sanders* and *Reynolds v. Sims* must be met, no question of that character is presented. For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of "one man, one vote" has no relevancy.

Sailors II, 387 U.S. at 111.

582. *Reynolds*, 377 U.S. at 575.

583. *Id.* (quoting Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907)) (emphasis added).

584. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (emphasis added); *see also* Avery v. Midland County, 390 U.S. 474, 480 (1968) ("[W]hen the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process.").

585. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966).

586. *See Dunn*, 405 U.S. at 336; *Harper*, 383 U.S. at 665.

587. *See Dunn*, 405 U.S. at 336; *Harper*, 383 U.S. at 665; *see also* Mixon v. Ohio, 1999 FED App. 0347P, 193 F.3d 389, 402 (6th Cir.) ("Although the right to vote, per se, is not a 'constitutionally protected right,' the Supreme Court has found, 'implicit in our constitutional system, [a right] to participate in state elections on an equal basis with other qualified voters *whenever* the State has adopted an elective process for determining who will represent any segment of the State's population.'") (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973)) (emphasis added).

State's legitimate interest in managing its schools through appointive boards.[588] The Court applied this reasoning in *Welch* and many other cases since *Sailors II*, which goes thus: "Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent *experimentation*."[589] In essence, the Court affords wide latitude to the State in the management of school districts, which exist at the pleasure of the State, in order to meet challenges and changing conditions in the district. Such challenges and changes include academic and financial mismanagement and other turmoil in the districts.

As the federal district court explained in *Welch*, "The need for freedom of state legislatures to experiment with different techniques and schemes is one of the rational bases for [imposition of an appointive system]. . . . In *Sailors* [*II*], the need to experiment seemingly was the only basis relied upon to satisfy the test of rational nexus."[590] The district court acknowledged that there is no fundamental right to vote for school board members.[591] Further, because there is no fundamental right to education under the U.S. Constitution, the education issues in these cases do not bolster the argument that there is a fundamental right to vote for school board members.[592]

In addition, the Supreme Court held in *Sailors II* that the one person, one vote principle is only relevant to elective systems, not appointive systems.[593] In ruling on the constitutionality of a New York law that permitted City of New York board members to be appointed, while suburban school boards were elected, the United States District Court for the Southern District of New York relied on *Sailors II* and *Hadley v. Junior College District of Metropolitan Kansas City*[594] in its declaration that the one person, one vote doctrine is of no relevance whatsoever to appointive boards.[595] In essence, the State can choose to replace an elective system for school board members with an appointive system.[596]

---

588. Sailors v. Bd. of Educ. (*Sailors II*), 387 U.S. 105, 110-11 (1967).

589. *Id.* (emphasis added); *see also* Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1355-56 (4th Cir.1989) (recognizing several legitimate reasons for appointed school boards rather than elected school boards).

590. Welch v. Bd. of Educ., 477 F. Supp. 959, 965 (D. Md. 1979).

591. *Id.* at 964-65.

592. *Id.*

593. *Sailors II*, 387 U.S. at 111.

594. 397 U.S. 50 (1970).

595. Sovak v. Bd. of Educ., No. 97 CIV. 7407(HB), 1998 WL 470507, at *1 n.4 (S.D.N.Y. Aug. 11, 1998), *aff'd*, No. 98-9287, 1999 WL 335380 (2d Cir. May 20, 1999); *see also* Fumarolo v. Chicago Bd. of Educ., 566 N.E.2d 1283, 1292-93, 1302-03 (Ill. 1990) (discussing *Hadley*, 397 U.S. 50, and *Sailors II*, 387 U.S. 105, and concluding that the State may determine to appoint rather than permit election of a local board).

596. *Fumarolo*, 566 N.E.2d at 1302-03; *see also* Pirincin v. Bd. of Elections, 368 F. Supp. 64, 69 (N.D. Ohio 1973).

Beyond this, the replacement of an elective system with an appointive system for school boards in a takeover does not violate the one person, one vote principle.[597] This principle is only violated if, *while* an elective system is the method of selection, each citizen is not allowed to participate equally in the election.[598] Indeed, the Supreme Court has also given states latitude to experiment with a hybrid system—combining appointive and elective systems for local school boards.[599]

In *Hadley*, the Supreme Court seemed to abandon the rigid distinction between administrative and legislative function from *Sailors II*, though not overruling any of its holdings in *Sailors II*.[600] In fine, the Court declared that government functions "'cannot easily be classified in . . . neat categories.'"[601] Affirming its holding in *Sailors II*, the Court made it clear that an appointive system in itself is not violative of the Equal Protection rights of residents of school districts.[602] In fact, the Court went on to note in *Hadley* that in cases where an appointive system is used in selecting school boards or other local government officials, each official does not have to represent the same number of people as is typically required in elective systems under the one person, one vote principle.[603]

In *Van Zanen v. Keydel*,[604] the Court of Appeals of Michigan followed the Supreme Court's holding in *Sailors II* in a challenge to the appointive system implemented in a political subdivision in Michigan.[605] The court held that substituting an appointive system for an elective system is not a violation of the Equal Protection Clause.[606] The court stated that "a state or local government may select some government officials by appointment. And where appointment is permissible, the one person-one vote doctrine does not apply."[607] Likewise, ruling on the constitutionality of a 1963 Chicago Public Schools takeover statute that gave the mayor the power to appoint the school board in place of the elected board, the Illinois Supreme Court ruled in *Latham v. Board of Education*[608] that "'no resident of a school district has an inherent right of franchise insofar as school elections are concerned. His right to vote therein is purely a permissive one bestowed by the legislative grace in furtherance of the policy of the

---

597. *See* Mixon v. Ohio, 1999 FED App. 0347P, 193 F.3d 389, 402-03 (6th Cir.)

598. *Id.*

599. *Sailors II*, 387 U.S. at 111 (noting that there is nothing unconstitutional with "experimenting").

600. *See* Hadley v. Junior Coll. Dist. of Metro. Kansas City, 397 U.S. 50, 55-56 (1970).

601. *Id.* at 56 (quoting Avery v. Midland County, 390 U.S. 474, 482 (1968)).

602. *Id.* at 58-59.

603. *Id.* at 58.

604. 280 N.W. 2d 535 (Mich. Ct. App. 1979).

605. *Id.* at 536, 538-39.

606. *Id.* at 539.

607. *Id.*

608. 201 N.E.2d 111(Ill. 1964).

legislature.'"[609]

In fact, most state constitutions have no provision for local school districts or local control of education;[610] constitutionally, the responsibility for education lies with the State.[611] The very small minority of states that do constitutionally provide for local control of education do not provide for local school boards.[612] Still, the tradition in America has been for States to delegate governance of schools to local school boards.[613] As Aaron Saiger cautiously notes:

> Notwithstanding the policy of local delegation, however, school district authority is contingent on a state grant of power. Therefore, a district's authority to direct education in a locality can be made [by the state] contingent on its performance. Just as a state should withdraw a contract from an underperforming contractor, or freeze a grant not being used to provide the services the grant was to support, it ought to act similarly vis-à-vis a school district.[614]

As our discussion above reveals, even when other school districts in the same state retain the right to vote for their school boards, no Equal Protection Clause violation is likely to be found when states take over school districts, albeit minority districts.[615] This result is especially likely because the Supreme Court has upheld the substitution of an appointive system for an elective system as rationally related to the legitimate end of experimenting with governance techniques for greater effectiveness of government functions.[616] However, if it is proven that racial animus was involved in the decision about which district to takeover, a case for an Equal Protection Clause violation is at least more viable.[617]

Furthermore, the Supreme Court has ruled that "[w]hen racial classifications are explicit [in a law], no inquiry into legislative purpose is necessary"[618] and

---

609. *Id.* at 116 (quoting People v. Deatherage, 81 N.E.2d 581, 588 (Ill. 1945)).

610. *See* Saiger, *supra* note 7, at 1846-47.

611. *Id.* at 1846.

612. *Id.*

613. *Id.* at 1846-47.

614. *Id.* at 1847.

615. *See supra* notes 551-609 and accompanying text.

616. *See* Hadley v. Junior Coll. Dist. of Metro. Kansas City, 397 U.S. 50, 58-59 (1970); Sailors v. Bd. of Educ. (*Sailors II*), 387 U.S. 105, 108 (1967). For an overview of *Sailors II*, see *supra* notes 561-83 and accompanying text. For an overview of *Hadley*, see *supra* notes 600-03 and accompanying text.

617. *See* Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (stating that "all laws that classify citizens on the basis of race, . . . , are constitutionally suspect and must be strictly scrutinized"); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (noting that it is constitutionally suspect to pursue a legislative action "because of" that action's "adverse effects upon an identifiable group").

618. *Hunt*, 526 U.S. at 546.

such laws must be strictly scrutinized.[619] None of the State takeover laws examined in Part I could be deemed to have explicit racial classifications,[620] except, arguably, those state laws that allow takeovers in cities with large populations.[621] For example, an Illinois provision applies to cities with over 500,000 inhabitants,[622] which means the law only affects Chicago, a high-minority school district.[623] Given the traditionally large number of minorities in the district and the fact that Chicago was the only city with over 500,000 inhabitants at the time of the statute's enactment,[624] it is apodictic that, in passing the law, the state legislature knew it would only apply to this predominantly minority district. However, the legislation is careful to include no explicit racial classification, instead expressly applying the provision to cities with over 500,000 inhabitants.[625] This shelters the provision from constitutional vulnerability as it is a facial classification based on population rather than race.

In fact, in upholding the law, the Illinois Supreme Court reasoned that the provision does not violate the Equal Protection Clause because "'[c]lassification on the basis of population is not objectionable where there is a reasonable basis therefor in view of the object and purposes to be accomplished by the

---

619. *Id.* As the Sixth Circuit has further noted,

> In *Village of Arlington Heights,* the Supreme Court identified five factors that are relevant for determining whether facially neutral state action was motivated by a racially discriminatory purpose: (1) the impact of the official action on particular racial groups, (2) the historical background of the challenged decision, especially if it reveals numerous actions being taken for discriminatory purposes, (3) the sequence of events that preceded the state action, (4) procedural or substantive departures from the government's normal procedural process, and (5) the legislative or administrative history.

Moore v. Detroit Sch. Reform Bd., 2002 FED App. 0204P, 293 F.3d 352, 369 (6th Cir.) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977)).

620. This includes the NCLB takeover provisions which serve as the basis for the State takeover provisions in various states as shown *supra* Part I.

621. Ohio's law is only applicable to municipal school districts in Cleveland. *See* H.B. 269, 122d Gen. Assem., Reg. Sess. (Ohio 1997). The Sixth Circuit upheld this law in *Mixon v. Ohio*, 1999 FED App. 0347P, 193 F.3d 389 (6th Cir.), and by referendum in 2002, Cleveland residents decided to retain the mayoral-appointment of board members. *See* Gewertz, *Clevelanders to Weigh in*, *supra* note 450, at 8; Moore, *supra* note 450. Missouri also seems to provide for a classification based on population, providing for takeovers in districts with populations over 350,000 inhabitants. MO. ANN. STAT. § 162.081(3) (West 2000 & Supp. 2008). However, the same provision extends the takeover to *all* districts. *Id.* Thus, the population classification in the statute seems unnecessary. *Id.*

622. 105 ILL. COMP. STAT. ANN. 5/34-1 (West 2006).

623. *See* City Population, http://www.citypopulation.de/USA-Illinois.html#Stadt_gross (last visited May 13, 2009).

624. *Id.*

625. 105 ILL. COMP. STAT. ANN. 5/34-1.01 (West 2006).

legislation.'"[626] At bottom, facial classifications based on population are subject to rational basis review. Indeed, the United States Supreme Court has also ruled that "[a] facially neutral law, on the other hand, warrants strict scrutiny only if it can be proved that the law was motivated by a racial purpose or object, or if it is unexplainable on grounds other than race."[627] It seems evident that all the statutes we examined above, including Illinois's, would pass muster under rational basis review. Furthermore, as articulated by the Supreme Court of Illinois, in "considering the validity of a legislative classification there is always a presumption [by the courts] that the General Assembly acted conscientiously, and this court will not interfere with its judgment except where the classification is clearly unreasonable and palpably arbitrary."[628]

In cases where there is a facially-neutral law, which in application has a disproportionate racial impact, the United States Supreme Court declared in *Washington v. Davis*[629] that "[its] cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact."[630] The Court also pointed out that it had

> rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "[t]he acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be."[631]

Once a prima facie case of discriminatory purpose is established, "'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'"[632]

IV. Implications for State Takeovers of Minority Districts

States that adopt the NCLB's multiple-option approach for corrective actions have a variety of approaches to experiment with before even considering takeovers.[633] If those options are ineffective, a court might be hard-pressed to

---

626. Latham v. Bd. of Educ., 201 N.E.2d 111, 114 (Ill. 1964) (quoting Apex Motor Fuel Co. v. Barrett, 169 N.E.2d 769, 775 (Ill. 1960)).

627. Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (internal quotation marks and citation omitted).

628. *Latham*, 201 N.E.2d at 114.

629. 426 U.S. 229 (1976).

630. *Id.* at 239.

631. *Id.* at 240-41 (quoting Jefferson v. Hackney, 406 U.S. 535, 548 (1972)).

632. *Id.* at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

633. It must also be noted that flexibility also exists for various jurisdictions pursuant to the NCLB section providing for State takeovers, which states:

deny deference to the State in its decision to take over the district.[634] Likewise, if the State conducts studies showing that the other options have been ineffective in that district, it will strengthen its case. Indeed, the fact that the NCLB-approach is an option rather than a mandate is certainly not a disadvantage. States might also be well-advised to establish specific timelines for emergence from takeovers, in statute or in practice when implemented, as opposed to indefinite takeovers. It also might help to implement a partial takeover that does not involve change of the elective system for the school board to an appointive one, though as noted above, this change is not necessarily fatal to a takeover.[635]

Measured takeovers that retain the elected board but reduce its powers, similar to some of those described above, might help.[636] However, community involvement, coupled with communication and education of the citizenry about the takeover and the State's reasons and goals for the takeover, are critical. The more support the takeover gets from the community, the less likely it is to face a challenge in the first place. Even if the State retains an elected board but renders the board effectively powerless as a mere ceremonial board, or one with very limited powers, the community could still find it very objectionable due to its implications for local control and trust of the minority residents.

As often happens, the citizens see the takeover as a state government's lack of trust in the minorities to run their school district.[637] Consequently, the importance of communication (and development of trust that accompanies communication) as well as relationship-building in the community to any takeover cannot be overestimated. Communication and trust would certainly help with the implementation of partnerships such as that of the Baltimore City Public Schools in 1997 or the Boston University/Chelsea Partnership.[638] Such partnerships, if truly collaborative, might be less challenged and may survive constitutional challenges *tant mieux*. These partnerships should certainly be

---

> [n]othing in this section shall be construed to alter or otherwise affect the rights, remedies, and procedures afforded school or school district employees under Federal, State, or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employees and their employers.

20 U.S.C. § 6316(d) (2006).

634. This is even more pertinent in those states that have yet to adjudicate the constitutionality of takeovers. However, there is no reason to suggest that they would not march in lockstep with the various cases discussed in this Article.

635. *See supra* notes 572-76, 593-609 and accompanying text.

636. As a description of a former West Virginia State Superintendent's opinion revealed, "Court battles might be avoided if takeovers preserved elected school boards . . . . 'Had we attempted to remove the local board, we'd probably still be in litigation today.'" Reinhard, *Racial Issues*, *supra* note 11.

637. *See, e.g.*, Hendrie, *supra* note 497.

638. For additional information on these partnerships, see *supra* notes 342-56 and accompanying text.

encouraged over hostile takeovers.

Within a reasonable time after a full takeover, residents could also be given the opportunity by referendum to decide whether to retain an appointive system. Given that school districts are subdivisions of the State, existing at the discretion of the State,[639] States could evidently take over a district. Nevertheless, without legislative authority, state agencies, such as the education department, embarking on their own to take over districts could face a challenge. This might even be so in cases where a state has accepted Title I funds, which requires implementation of the NCLB's mandates, yet lacks any statutory authority for takeovers. The state legislature, however, could remedy the potential for ultra vires takeovers by simply enacting legislation authorizing the takeover; after all, as previously emphasized, districts are subdivisions of the state existing at its discretion. The State could, a fortiori, choose to enact laws that provide for an appointive system in a district rather than just authorizing a takeover. In any case, in addition to the grant of authority for a general takeover, the legislature should be as explicit as possible when granting state agencies the authority to replace an elected board with an appointed board as part of a takeover.

In those districts where partial takeovers occur, the State must of course ensure that it respects the electoral franchise, securing each citizen's equal right to vote. Clearly, takeovers must not be driven by racial animus. It is important to document, again and again, the reasons for the takeover, so that in a challenge the State can present its legitimate reasons to the courts. While the racial demographic physiognomy of takeovers in a state would not alone strike a fatal blow to a contemplated or implemented takeover, the physiognomy should give the State cause to pause in order to evaluate and address the reasons for the racially disproportionate takeovers. Further, racial classifications should not be included in laws or policies, as those would likely be subjected to strict constitutional scrutiny.[640] Beyond avoiding racial animus in decisions about takeovers, racial implementation of any and all aspects of the takeover must be absolutely obviated.

District residents could clearly resort to the political process (elected state legislative and executive officials) to prevent State takeovers. They could petition their elected officials to oppose a takeover, or vote out those who favor the takeover or those who refuse to act on their petitions to prevent the takeover.[641] In cases where the executive officials who make such decisions are appointed officials, political pressure could be put on the elected officials who are ultimately responsible for selecting such appointed officials; the political pressure could be applied either to prevent the takeover or encourage its implementation in a way that the residents do not disfavor. Examples of political pressure include phone calls to elected officials, demonstrations, and voter

---

639. *See* Sailors v. Bd. of Educ. (*Sailors II*), 387 U.S. 105, 107-08 (1967).

640. *See supra* note 618-19 and accompanying text.

641. *See, e.g.*, Mixon v. Ohio, 1999 FED App. 0347P, 193 F.3d 389, 406 (6th Cir.) (suggesting that voicing opinion at national and state elections is a proper course of action).

registration drives targeting vulnerable officials. Residents could also organize to seek a state constitutional amendment preventing State takeovers, or exert pressure on their legislators to enact laws that would not allow takeovers or only allow them as a last resort. Various forms of such amendments or laws could be passed, including those which stop short of barring takeovers but preserve the right to vote and avoid a mere ceremonial board. Of course, residents could look to the judiciary. However, as discussed previously, courts have been reluctant to halt implementation of an appointive system but less disinclined to intervene in an elective system that infringes the right to equal participation in voting.[642]

Provision for appointment of a replacement board by another elected official, such as a mayor, could lessen objections to a State takeover of a school district. A mayor is a municipal official, unless the State indicates otherwise.[643] As discussed above, some takeovers do provide for a mayorally-appointed board.[644] Fewer objections from a full takeover might come from the fact that the mayor is elected by the residents and that the elected mayor appoints members of the school board.[645] However, even this type of an arrangement has been challenged. In *Mixon v. Ohio*,[646] the plaintiffs challenged the mayoral-appointment of board members in Cleveland.[647] They claimed that the state law providing for the mayoral appointment denied them equal protection of the laws because some of the residents of the Cleveland Public School District were not eligible to vote in the mayoral election.[648] The court characterized the plaintiffs' challenge as follows:

> [O]ther cases, such as this one, address voter disenfranchisement when a municipality has some control over non-residents who cannot vote in municipal elections, [i.e.], cases of extraterritorial jurisdiction. Here, one [p]laintiff is not a resident of the City of Cleveland and does not

---

642. *See supra* notes 572-87 and accompanying text.

643. *Mixon*, 193 F.3d at 399.

644. *See, e.g.*, *supra* notes 569-74, 572-76 and accompanying text.

645. *See Mixon*, 193 F.3d at 399.

646. 1999 FED App. 0347P, 193 F.3d 389 (6th Cir.).

647. *Id.* at 393-94. Recall that in 2002 Clevelanders chose to permanently retain the mayoral appointment of board members. For an overview of State involvement with the Cleveland Public Schools, see *supra* Part II.M.

648. As the Court summarized,

> In their final equal protection challenge, [p]laintiffs allege that H.B. 269 "unconstitutionally compounds the voting disenfranchisement for some residents in the Cleveland Public School District living in the Village of Bratehahl, Linndale, Newburgh Heights and part of Garfield Heights, because these residents do not vote in the Cleveland mayoral elections." According to Plaintiffs, non-Cleveland residents who reside in the same school district lose their elective opportunity to vote for the person who appoints individuals to their school board, thus depriving them of equal protection under the law.

Id. at 404.

> vote in the City's mayoral elections even though the mayor appoints a school board that encompasses [p]laintiff within its jurisdiction.[649]

In upholding the system of mayoral appointment, the United States Court of Appeals for the Sixth Circuit ruled that "non-residents do not necessarily have the right to vote in a city election simply because the city has some limited authority over the non-residents."[650] In other words, the mere fact that the City has authority over non-residents, in governing the school district in which those non-residents reside, does not entitle those non-residents to vote in a city election.[651] In such cases, while reviewing equal protection challenges to mayoral appointment, "courts employ rational basis review, granting the States wide latitude to create political subdivisions and exercise state legislative power."[652] In *Mixon*, the State satisfied the low threshold of rational basis review because it sought to address the problems in the failing district.[653]

The circuit court poignantly expressed the gravamen of the ruling:

> [E]xtraterritorial voters in the outer Cleveland suburbs are not "residents" of the City of Cleveland and surely do not deserve the right to vote in Cleveland mayoral elections. Although [p]laintiffs are residents of the municipal school district, no elections occur within that jurisdiction from which [p]laintiffs are excluded. If the municipal school boards were elected bodies and only the Cleveland residents could vote in the school board election, then the relevant geopolitical entity would be the municipal school district [and strict scrutiny would apply].[654]

CONCLUSION

The moral is that in cases of extraterritorial jurisdiction, state provisions for mayoral appointment are not necessarily violative under rational basis review. If any form of election is allowed for the school board, however, all residents of the district (even those not eligible to vote for the mayor) must be given equal access to the right to vote. Still, if seeking to minimize objections, it might be best to simply retain an elected board in cases of extraterritorial jurisdiction, with the mayor having more of a supervisory rather than an appointive power over the board. However, the key is to avoid infringement of equal access to the voting franchise of the residents of the relevant school district. Let us all keep in mind that while, *ceteris paribus,* reforms are good, sensitivity to the disparate application of reform is prudent in order to minimize what could amount to

---

649. *Id.* at 404-05 (internal citation omitted).

650. *Id.* at 405 (citing Holt v. City of Tuscaloosa, 439 U.S. 60, 69 (1978)).

651. *See id.* at 404-06.

652. *Id.* at 405 (citing *Holt*, 439 U.S. at 71).

653. *Id.* at 406 (the legislation at issue "relate[d] to the legitimate state interest of improving public schools").

654. *Id.* at 405-06.

protracted litigation over good faith efforts and broken trust in local communities. Even in those cases where takeovers are legally justified, states should strive to retain the elective system. As Justice Black once wrote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[655]

655. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

Indiana Law Review

Volume 42 **2009** **Number 2**

NOTES

OVERKILL: AN EXAGGERATED RESPONSE TO THE SALE OF MURDERABILIA

ELLEN HURLEY*

INTRODUCTION

On May 24, 2007, U.S. Senator John Cornyn of Texas introduced a bill that would make it illegal for any prisoner who is incarcerated in a federal or state prison to deposit any object for delivery or for mailing with the intent that the object be placed in interstate or foreign commerce.[1] Violation of the proposed "Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007" carries a sentence of at least three years and a maximum of ten years to run consecutively to a prisoner's current sentence.[2] Andy Kahan, the director of the Houston Mayor's Crime Victims Office, lobbied the Senator to introduce the bill.[3] Kahan, a nationally known advocate for crime victims, learned about the practice of buying and selling memorabilia associated with serial killers as early as 1999. He "launched a crusade to wipe it out, state by state, as an affront to crime victims."[4] Kahn's passion stems from his concern for people like Harriett Semander, whose daughter was murdered by Coral Eugene Watts, a confessed killer of thirteen women.[5] Semander learned that items associated with Watts, "like letters and envelopes with his handwriting" were being sold on "Internet

---

* J.D. Candidate, 2009, Indiana University School of Law—Indianapolis; B.S., 2005, Indiana University Purdue University Indianapolis. I would like to thank Professors Mary Harter Mitchell, Gerard N. Magliocca, and R. George Wright who were my sounding boards as I began to sort out the issues for this Note. I especially thank my family who supports me in every endeavor—my husband Dave (who, when I mentioned I might want to go to law school, immediately ran over to campus to pick up all the registration information), and my sons, Brian, Michael, and Sean, who cheer me on and keep me entertained at the same time.

1. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(a) (2007).

2. *Id.*

3. *Day to Day: Texas Law Would Prevent Sale of 'Murderabilia'* (National Public Radio broadcast July 30, 2007) [hereinafter *Day to Day*] (transcript on file with author).

4. Jeff Barnard, *'Murderabilia': People Want to Get Closer to Killers*, TELEGRAPH-HERALD (Dubuque, Iowa), Oct. 8, 2000, at A4.

5. *Day to Day*, *supra* note 3.

sites that specialize in merchandise from convicted felons."[6]

Senator Cornyn seeks to prevent the sale of items associated with criminals by blocking them at their source—the prison gates. This is a new approach to the old problem of criminals profiting from their crimes. Many anti-profiting laws aimed at criminals, particularly the so-called "Son of Sam laws" which target proceeds derived by criminals from the sale of the depiction of their crimes, are constitutionally defective.[7]

This Note discusses whether the proposed "Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007"[8] resolves the constitutional problems of past anti-profiting legislation without creating new problems of its own. Part I explains what "murderabilia" is and what policy reasons justify banning its sale. Part II gives an overview of Son of Sam laws and other anti-profiting legislation, and discusses the constitutional problems they have faced. Part III analyzes Senator Cornyn's bill, and compares it to past legislation that courts have found unconstitutional, to determine whether the bill, if passed, would withstand constitutional challenge. Part IV discusses some possible negative ramifications of the bill. Finally, Part V evaluates the approaches that some states have taken, as well as approaches that others have suggested, to accomplish the dual goals of compensating victims and preventing criminals from profiting from their crimes without violating prisoners' constitutional rights. Part V asserts that some combination of these other approaches is far superior to Senator Cornyn's proposed bill.

I. WHAT IS MURDERABILIA, AND WHY BAN ITS SALE?

The term "murderabilia," first coined by Andy Kahan, refers to items associated with notorious criminals that have found a market on various Internet sites that cater to serious collectors and to those with a macabre fascination for crime-related memorabilia.[9] The term encompasses anything offered for sale that was either created by or owned by a criminal, as well as any item related to a notorious crime, over which the criminal may or may not have had any control (and for which the prisoner may or may not receive any profit).[10] Those items

---

6. *Id.*

7. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991); Keenan v. Superior Court of Los Angeles County, 40 P.3d 718, 735 (Cal. 2002); *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 352 (Mass. 2002); Seres v. Lerner, 102 P.3d. 91, 100 (Nev. 2004); *see also* Kathleen Howe, Comment, *Is Free Speech Too High a Price to Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 LOY. L.A. ENT. L. REV 341, 342-43 (2004).

8. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007).

9. Hilary Hylton, *Cracking Down on "Murderabilia,"* TIME, June 5, 2007, *available at* http://www.time.com/time/nation/article/0,8599,1629655,00.html.

10. The public's interest in crime-related objects is not a recent phenomenon. For instance, after a fire in 1908 revealed the remains of several victims of serial killer Belle Gunness in LaPorte,

include: "A form letter from Martha Stewart, written on her trademark *Living* stationery and sent to supporters during her prison stay" (selling for $25) and "[a]n envelope hand-addressed by jailed Panamanian General Manuel Noriega" (priced at $350).[11] Those innocuous items pale in comparison to some of the "macabre, shocking and soul-chilling prison collectibles" available for purchase online—"magazine fashion ads defaced with satanic symbols and stained with the bodily fluids of a campus shooter, a sketch of a headless victim drawn by a Death Row murderer, even fingernail clippings and foot scrapings from a serial killer."[12]

Not all sites cater to notorious criminals, however. Prisonart.org[13] and prisonerlife.com[14] are websites that offer prisoners who create crafts and artwork while incarcerated an online outlet for their works regardless of their own notoriety. Why, then, is it so important to prevent prisoners from selling these items?

A. Victims' Interests

When Harriett Semander discovered that a letter penned by her daughter's killer was being auctioned off on a website twenty-five years after the murder, "all the feelings of grief [came] flooding back."[15] Protecting those who have suffered at the hands of vicious criminals from public reminders of the violation they have experienced is the impetus behind Senator Cornyn's bill[16] and Andy Kahan's lobbying efforts in support of the bill.[17] Regardless of society's empathy for such victims, however, the United States Supreme Court stated in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,[18] that "'[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'"[19] The Court

---

Indiana, "Ringling Brothers Circus purchased the pony and cart that Belle's children used to travel back and forth to school." Dan McFeely, *Belle Gunness*, INDIANAPOLIS STAR, Dec. 30, 2007, at A15. The cart "became an attraction at sideshows across America, wherever the circus went." *Id.*

11. Hylton, *supra* note 9.

12. *Id.*

13. PrisonArt.org, http://www.prisonart.org/ (last visited Sept. 30, 2008) (listing for sale a variety of prisoner-made arts and crafts, including acrylics, ceramics, cross stitch, ink art, jewelry, music, oil paintings, textiles and water colors).

14. PrisonerLife.com, Prison Art, http://www.prisonerlife.com/prisonart/prisonart.cfm (last visited Sept. 30, 2008).

15. Gigi Stone, *'Murderabilia' Sales Distress Victims' Families*, ABC WORLD NEWS, Apr. 15, 2007, http://abcnews.go.com/wnt/us/story?id=2999398&page=1 (last visited Sept. 30, 2008).

16. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007).

17. Barnard, *supra* note 4.

18. 502 U.S. 105 (1991).

19. *Id.* at 118 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)).

in *Simon & Schuster* further acknowledged that the New York State Crime Victims Board (Board), who pursued the proceeds of mobster Henry Hill's depiction of his exploits, was correct when it did not "assert any interest in limiting whatever anguish . . . victims may suffer from reliving their victimization."[20] Although protecting crime victims from this particular agony is not a state interest powerful enough to overcome First Amendment concerns, the Court in *Simon & Schuster* identified two compelling interests—preventing prisoners from profiting from their crimes and compensating victims of crime—which do justify relief for some victims.[21]

B. Prisoners Profiting from Their Crimes

A state has "no compelling interest in shielding readers and victims from negative emotional responses to a criminal's public retelling of his misdeeds."[22] It does "have compelling interests in 'ensuring that victims of crime are compensated by those who harm them,' . . . 'preventing wrongdoers from dissipating their assets before victims can recover,' . . . 'ensuring that criminals do not profit from their crimes,' . . . and transferring the fruits of crime from the criminals to their victims."[23] The original Son of Sam law set out to accomplish those goals by providing that any entity contracting with a person accused or convicted of a crime for the purchase of the rights to the story or depiction of his crime must turn over any funds due the criminal to the Board.[24] The Board would hold those funds in escrow

> for the benefit of and payable to any victim . . . provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such [accused or convicted] person or his representatives.[25]

Senator Cornyn's bill provides for both criminal and civil forfeiture of any funds acquired in violation of his proposed law, as well as civil remedies for victims including injunction, compensatory and punitive damages, and the cost of bringing the action.[26] Like the drafters of New York's Son of Sam law,[27] Senator Cornyn has attempted to serve those two compelling state

---

20. *Id.*

21. *Id.* at 118-19.

22. Keenan v. Superior Court of Los Angeles County, 40 P.3d 718, 727 (Cal. 2002) (citing *Simon & Schuster*, 502 U.S. at 118).

23. *Id.* (quoting *Simon & Schuster*, 502 U.S. at 118-20).

24. *Simon & Schuster*, 502 U.S. at 109 (citing N.Y. EXEC. LAW § 632-a(1) (McKinney 1982)).

25. *Id.* at 109 (quoting N.Y. EXEC. LAW § 632-a(1) (McKinney 1982)).

26. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. §§ 3-5 (2007).

27. *Simon & Schuster*, 502 U.S. at 118.

interests—compensating victims and keeping criminals from profiting from their crimes. The United States Supreme Court determined that the original Son of Sam law was unconstitutional, however, in that it violated a prisoner's First Amendment right to free speech.[28] In order to determine whether Senator Cornyn's proposed law, which takes an entirely different approach from past and current anti-profiting legislation, would pass constitutional muster, it is necessary to examine the flaws uncovered in the original Son of Sam law and in other state laws modeled after it.

II. THE TROUBLED HISTORY OF SON OF SAM LAWS

A. Simon & Schuster v. Members of New York State Crime Victims Board

In the summer of 1977, postal worker David Berkowitz, the self-named "Son of Sam," caused terror among the citizens of New York and profound grief among his victims, their families, and loved ones.[29] His "murder spree . . . claimed six lives, left seven injured and set off the most extensive manhunt in New York City history."[30] Although the terror may have subsided upon Berkowitz's capture, the pain suffered by victims and their families lingered. Rumor had it that Berkowitz stood to make a substantial profit from the publishing rights to his story.[31] The New York legislature quickly enacted a law to prevent him from profiting from his crimes.[32]

The statute's intent was "to 'ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.'"[33] Ironically, the statute was never enforced against Berkowitz for two reasons. First, he was found incompetent to stand trial and the version of the statute in force at the time applied only to convicted persons.[34] Second, Berkowitz voluntarily donated the proceeds from a book about himself to the victims of his crimes and their estates.[35]

Six years later, New York attempted to enforce the law against mobster Henry Hill, an admitted perpetrator of a multitude of crimes, who, in exchange for his testimony against fellow organized crime members, was granted immunity and was admitted to the Federal Witness Protection Program.[36] When the Board became aware that Hill had contracted with publisher Simon & Schuster for a book about his life, it notified the publisher that, pursuant to the Son of Sam law,

---

28. *Id.* at 123.

29. *Id.* at 108.

30. George Hodak, *Son of Sam Is Arrested*, A.B.A. J., Aug. 2007, at 72.

31. *See id.*

32. *Simon & Schuster*, 502 U.S. at 108.

33. *Id.* (quoting Assembly Bill Memorandum Re: A 9019, July 22, 1977, reprinted in Legislative Bill Jacket, 1977 N.Y. Laws, ch. 823).

34. *Id.* at 111.

35. *Id.*

36. *Id.* at 112.

the publisher must turn over its contract with Hill, as well as any proceeds due to him.[37] Simon & Schuster filed suit under 42 U.S.C. § 1983, claiming that the law was a violation of the First Amendment and seeking injunction against its enforcement.[38] The district court found the law constitutional[39] and a divided Second Circuit agreed.[40] "Because the Federal Government and most of the States [had] enacted statutes with similar objectives,"[41] and because the "issue is significant and likely to recur,"[42] the Supreme Court granted certiorari.[43]

1. Content-Based Speech Regulation.—The Court first recognized that the New York law, which targeted a criminal's proceeds earned from any depiction of his crime, was a "content-based statute" in that "[i]t singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content."[44] As the Court had previously stated and reiterated in this case:

> The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[45]

The Court determined that the provision in the statute that "escrows all of the speaker's speech-derived income for at least five years" operated as a "disincentive[] to speak."[46] Applying strict scrutiny, the Court then proceeded to determine whether the law was "narrowly tailored to advance" the State's compelling interest in ensuring that crime victims are compensated.[47]

2. Overinclusiveness.—The Court found the law "significantly overinclusive" in two ways.[48] First, it targeted "works on *any* subject, provided

---

37. *Id.* at 114.

38. *Id.* at 114-15.

39. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 724 F. Supp. 170, 180 (S.D.N.Y. 1989), *aff'd sub nom.*, Simon & Schuster, Inc. v. Fischetti, 916 F.2d 977 (2d Cir. 1990), *rev'd*, 502 U.S. 105 (1991).

40. *See Simon & Schuster*, 916 F.2d at 778, *rev'd* 502 U.S. 105 (1991).

41. *Simon & Schuster*, 502 U.S. at 115 (citing 18 U.S.C. § 3681 (1988)); Karen M. Ecker & Margot J. O'Brien, Note, Simon & Schuster, Inc. v. Fischetti*: Can New York's Son of Sam Law Survive First Amendment Challenge?*, 66 NOTRE DAME L. REV. 1075, 1075 n.6 (1991) (listing state statutes).

42. *Simon & Schuster*, 502 U.S. at 115.

43. Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 498 U.S. 1081 (1991).

44. *Simon & Schuster*, 502 U.S. at 116.

45. *Id.* (quoting Leathers v. Medlock, 499 U.S. 439, 448-49 (1991)).

46. *Id.* at 116-17.

47. *See id.* at 120-21.

48. *Id.* at 121.

that they express the author's thoughts or recollections about his crime, however tangentially or incidentally."[49] Second, the Court determined that the application of the law was overbroad in that the state's definition of "person convicted of a crime," included "any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted."[50] The Court expressed concern that these two provisions combined to "encompass a potentially very large number of works" that would be subject to enforcement.[51] Consequently, the Court reversed, finding that the law was not narrowly tailored to advance the compelling interest of compensating victims of crimes[52] and was, hence, "too overinclusive to satisfy the requirements of the First Amendment."[53]

B. Son of Sam Laws After Simon & Schuster

After the Supreme Court struck down New York's Son of Sam law in 1991, many states attempted to amend their own Son of Sam laws[54] to comply with the Court's holding with limited success.[55] The states are in good company, though. The federal Son of Sam law[56] contains provisions similar to the New York law and, consequently, "the current guidance from the Justice Department to its line prosecutors is that this law cannot be used because of constitutional problems."[57] The evolution of the law in this area is slow-going—Son of Sam laws target criminals who, in those relatively rare instances, have the potential to make significant money from their notoriety. As the Court pointed out in *Simon & Schuster*, the New York law was "invoked only a handful of times," in cases of "highly publicized crimes."[58] Since *Simon & Schuster*, only a few states have faced challenges to their own anti-profiting laws that were amended or revised in an attempt to comply with the Court's holding.[59] Maryland's law was one of

---

49. *Id.*

50. *Id.* (citing N.Y. EXEC. LAW § 632-a(10)(b) (McKinney 1982)).

51. *Id.* Examples of works that would fall under the statute because they include some admission by the author of the commission of past crimes include *The Autobiography of Malcolm X*, Henry David Thoreau's *Civil Disobedience*, and *The Confessions of Saint Augustine*, among others. *See id.*

52. *Id.* at 123.

53. *Id.* at 122 n*.

54. *See In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 347 n.4 (Mass. 2002) (citing state statutes modeled after New York's law).

55. *See, e.g.*, Keenan v. Superior Court, 40 P.3d 718, 728 n.13 (Cal. 2002) (noting that as of 2002, only one other state Son of Sam law had been invalidated since *Simon & Schuster*, specifically, Rhode Island's law in Bouchard v. Price, 694 A.2d 670 (R.I. 1997)); *Opinion of the Justices*, 764 N.E.2d at 343; Seres v. Lerner, 102 P.3d. 91 (Nev. 2004).

56. *See* 18 U.S.C. § 3681 (2006).

57. Paul G. Cassell, *Crime Shouldn't Pay: A Proposal to Create an Effective and Constitutional Federal Anti-Profiting Statute*, 19 FED. SENT'G REP. 119, 119 (2006).

58. *Simon & Schuster*, 502 U.S. at 111.

59. *See, e.g.*, *Keenan*, 40 P.3d at 734 n.22 (holding that the provisions of California's Son

the first challenged.[60]

1. Curran v. Price.[61]—Maryland amended its Son of Sam law in 1992 in response to *Simon & Schuster* to make "its provisions content-neutral and remedy the problem of overbreadth."[62] The law provided that any "'person' who enters into a notoriety of crimes contract with a 'defendant'"[63] must submit that contract to the attorney general for a determination of whether it is a notoriety of crimes contract.[64] If the defendant chooses to contest the determination, the attorney general determines whether the "subject matter of the contract only tangentially or incidentally relates to the crime"[65] (in which case, the contract would not be affected by the Son of Sam law). Any monies due the defendant as a result of a notoriety of crimes contract must be paid to the attorney general and held in escrow for the compensation of crime victims.[66]

In 1993 the newly-amended law was challenged when former school teacher Ronald Price was indicted for "sexual child abuse and unnatural and perverted practices committed upon former students."[67] Price basked in the media attention that resulted from his indictment.[68] When the assistant attorney general assigned

---

of Sam law were "invalid infringements on speech" under both the U.S. and California constitutions); *Seres*, 102 P.3d. at 100 (finding that the Nevada law, like the New York law, suffered from overinclusiveness).

60. *See* Curran v. Price, 638 A.2d 93 (Md. 1994).

61. 638 A.2d 93, 98 (Md. 1994).

62. *Id.* at 99.

63. *Id.* at 96 (citing MD. ANN. CODE art. 27, § 764(a)(5) (1992 Repl. Vol. & Supp. 1993) (repealed 2001)). The court quoted the statute, which indicated that a notoriety of crimes contract is

> a contract with respect to
> "(i) The reenactment of a crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, or live entertainment of any kind;
> (ii) The expression of the defendant's thoughts, feelings, opinions, or emotions regarding a crime involving or causing personal injury, death, or property loss as a direct result of the crime; or
> (iii) The payment or exchange of any money or other consideration or the proceeds or profits that directly or indirectly result from a crime, a sentence, or the notoriety of a crime or sentence."

Id. (quoting MD. ANN. CODE art. 27, § 764(a)(5) (1992 & Supp. 1993) (repealed 2001)).

64. *Id.* (citing MD. ANN. CODE art. 27, § 764(b) (1992 & Supp. 1993) (repealed 2001)).

65. *Id.* at 96 (citing MD. ANN. CODE art. 27, § 764(c)(3) (1992 & Supp. 1993) (repealed 2001)).

66. *Id.* (citing MD. ANN. CODE art. 27, § 764(b) (1992 & Supp. 2003) (repealed 2001)).

67. *Id.* at 97.

68. *Id.* As a result of his indictment, Price "appeared on national television talk shows acknowledging that he had engaged in sexual relationships with several of his female high school students" and "granted interviews to various local and national news media." *Id.* In one interview, he admitted that he had "entered into a contract to sell 'his story.'" *Id.*

to the case learned that Price had entered into a contract to relate the details of his crime, he demanded a copy of the contract to determine whether it fit the Son of Sam law's definition of a notoriety of crimes contract.[69] Price claimed that the statute was unconstitutional and refused to turn over the contract. The attorney general filed a complaint for injunctive relief.[70]

The trial court found the statute "unconstitutional and unenforceable."[71] It determined that the law was a "content-based regulation of speech" because the "notoriety of crimes contract was one respecting the expression of the defendant's thoughts, feelings, opinions or emotions regarding a crime."[72] It further found that the statute "swept so broadly as to reach forms of expression which the State had no compelling interest to regulate."[73]

On appeal, the attorney general petitioned the higher court to determine the statute's constitutionality.[74] The Maryland Court of Appeals, however, chose not to make that determination.[75] The court instead focused on the language of the statute and determined that the law's provision requiring a person entering into a notoriety of crimes contract with a defendant to submit that contract to the attorney general put no burden on the defendant to produce the contract.[76] The court acknowledged that

> it will be difficult for the Attorney General to obtain a contract where the identity of the other contracting party is not known[,] [b]ut the other party to the contract is required by the statute to produce it, and *assuming the constitutionality of § 764*, is subject to a severe penalty for failure to do so.[77]

Despite the court's reluctance to make a determination of the constitutionality of the statute, the trial court's analysis, combined with the appeals court's statement, indicates that the Maryland Son of Sam law would not pass constitutional muster if challenged.[78]

2. State v. Letourneau.[79]—In 1997, Washington school teacher Mary K. Letourneau gained notoriety when she was charged with child rape after admitting to a sexual relationship with one of her teenage students.[80] At her

---

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* (internal quotation marks omitted).

73. *Id.*

74. *Id.* at 97-98.

75. *Id.* at 104, 107.

76. *Id.* at 106.

77. *Id.* at 107 (emphasis added). The court, having found that the suit against Price was not authorized by statute, chastised the trial court for addressing the constitutionality of the Son of Sam law. *Id.*

78. *See generally* Curran v. Price, 638 A.2d 93 (Md. 1994).

79. 997 P.2d 436 (Wash. Ct. App. 2000).

80. *Id.* at 439-40.

guilty plea hearing, the judge attached conditions to her suspended eighty-nine-month sentence[81] including that she have no contact with her victim and that she "not receive any tangible or intangible property . . . that is a direct or indirect result of her commission of the crimes—in other words, she was ordered not to profit from publishing or otherwise commercializing the story of her crimes."[82] One professional who evaluated Letourneau for the purpose of the alternative sentencing recommended that she not be permitted any contact with the media because "[b]eing the center of attention feeds into her narcissism and undermines her treatment. If treatment is undermined, it increases the likelihood of reoffense."[83] However, the trial court's order prohibited financial gain rather than media contact.[84] In fact, the court referenced Washington's Son of Sam statute when discussing that particular probation condition.[85]

After Letourneau was discovered in the company of her victim, the trial court revoked the suspension of her sentence, but ruled that the condition against her profiting from her crime was still in effect.[86] Letourneau then challenged the constitutionality of Washington's Son of Sam statute as "violative of the First Amendment."[87] The court of appeals found it unnecessary to rule on the constitutionality of the Son of Sam law because it held that the trial court erred in continuing the conditions of probation (including the financial gain prohibition) once probation was revoked.[88] Therefore, the court granted Letourneau relief without directly addressing the Son of Sam law's constitutionality.[89]

The court did, nevertheless, offer a hint as to its opinion about the anti-profiting law when it stated that "[t]o forbid convicted persons from acquiring any such properties [acquired by reason of the convicted person's commercialization of the crime] in the first place would frustrate a means by which the Legislature has chosen to fund compensation for victims of crime."[90] The court further pointed out that there was no "showing in this record that Letourneau committed second degree rape of a child in order to profit from telling her story" or that "allowing her to profit from commercialization of the story of her crimes increases the likelihood that she will commit the offense again."[91] The court seemed to indicate its support for the Son of Sam law's

---

81. *Id.* at 438. The Court granted Letourneau's request for a Special Sexual Offender Sentencing Alternative and suspended her sentence provided certain conditions were met. *See id.*

82. *Id.*

83. *Id.* at 442 (internal quotation marks omitted).

84. *Id.*

85. *Id.* at 439.

86. *Id.* at 438-39.

87. *Id.* at 439.

88. *Id.*

89. *Id.*

90. *Id.* at 443.

91. *Id.*

purpose, but remained silent as to its constitutional flaws.[92]

3. In re Opinion of the Justices to the Senate.[93]—After *Simon & Schuster*, Massachusetts repealed its existing Son of Sam law and drafted a new law, ostensibly resolving the problems identified by the United States Supreme Court in the New York law.[94] The proposed amended law provided that

> certain contracts with a person who committed a crime be submitted to the division of victim compensation and assistance within the Department of the Attorney General (division) for its determination whether the proceeds under the contract are substantially related to a crime. If so, the contracting entity must pay over to the division any monies which would otherwise be owed to the person who committed the crime. The funds are then to be deposited into an escrow account and made available to the victims of the crime.[95]

According to the court, the bill defined "'[p]roceeds related to a crime' as 'any assets, material objects, monies, and property obtained through the use of unique knowledge or notoriety acquired by means and in consequence of the commission of a crime.'"[96]

The state senate asked the Massachusetts Supreme Court for an opinion as to whether the new bill violated the First Amendment.[97] The court found that although the bill targeted proceeds from the sale of items that were not related to speech, it still suffered from constitutional defects.[98] A portion of the bill required that the state make a determination and distinguish between proceeds "substantially related to a crime" and those "relating only tangentially to, or containing only passing references to, a crime."[99] As the court stated, "[b]y definition, if the applicability of the bill's requirements can only be determined by reviewing the contents of the proposed expression, the bill is a content-based regulation of speech."[100] The bill had not successfully eliminated the content-based problem that plagued the original Son of Sam law.[101]

4. Keenan v. Superior Court.[102]—Thirty-five years after his kidnapping,

---

92. *See id.*

93. 764 N.E.2d 343 (Mass. 2002).

94. *See id.* at 347 (noting that New York had also repealed its Son of Sam Law and replaced it with a new law intended to remedy the flaws in the original law).

95. *Id.* at 345.

96. *Id.*

97. *Id.* at 344-45.

98. *Id.* at 347.

99. *Id.* at 345.

100. *Id.* at 348.

101. It is worth noting that the court was concerned only with the limits on speech, and that "portions of . . . [the bill] regulate nonexpressive activity, and those portions would not violate or otherwise impinge on the right of freedom of speech." *Id.* at 347.

102. 40 P.3d 718 (Cal. 2002).

Frank Sinatra, Jr. sought enforcement of California's Son of Sam law.[103] The January 1998 issue of *New Times Los Angeles* contained an article based on the author's interviews with Sinatra's convicted kidnappers entitled *Snatching Sinatra.*[104] The profits from the story were to be split among the publisher, the author, and the kidnappers.[105] In addition, other publications reported that Columbia pictures had purchased the rights to the kidnapping story for $1.5 million.[106] Sinatra insisted that the studio withhold payment to the kidnappers or their representatives and, upon Columbia's refusal, he filed suit seeking enforcement of California's Son of Sam law.[107]

Sinatra argued that the California law, unlike the New York law, was not facially invalid.[108] The California law attempted to avoid the overinclusiveness of the overturned New York law in two ways. First, it targeted proceeds "'based on' the 'story' of a felony for which the felon was convicted, *except where the materials mention the felony only in 'passing . . . , as in a footnote or bibliography.'*"[109] The court held that this exception was insufficient to eliminate the content-based element of the statute.[110] It still "places a direct financial disincentive on speech or expression about a particular subject."[111] Under strict scrutiny, the law suffered from overinclusiveness similar to the New York law.[112] Second, the law applied only to convicted felons which purported to eliminate the Supreme Court's concern expressed in *Simon & Schuster* about enforcement against those who have "*admitted* crimes for which he or she had not been convicted."[113] "Though section 2225(b)(1), unlike the New York law, applies only to persons actually convicted of felonies, and states an exemption for mere 'passing mention of a felony, as in a footnote or bibliography,' these differences [did] not cure the California statute's constitutional flaw."[114]

---

103. *Id.* at 722-23.

104. *Id.* at 723.

105. *Id.*

106. *Id.*

107. *Id.* The portion of the statute that the Petitioner challenged was the part of section 2225 modeled largely after New York's law (section 2225(b)(1)). *See id.* at 721 n.4. What was not addressed by this court, because it was not raised by the Petitioner, is the constitutionality of section 2225(b)(2), which "confiscates profits from memorabilia, property, things, or rights sold for values enhanced by their felony-related notoriety value." *See id.*

108. *See id.* at 723.

109. *Id.* at 721 (quoting CAL. CIV. CODE § 2225 (1986), *reprinted in* CAL. CIV. CODE § 2224.1(a)(D)(7) (1985)).

110. *Id.* at 728.

111. *Id.*

112. *See id.* at 731.

113. *Id.* at 722 (citing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 121 (1991)).

114. *Id.* (internal citations omitted). Additionally, although the court did not directly address the issue, the ACLU suggested that the statute was overbroad in another way—it provided that confiscated funds earned by the felon, if not claimed by the victim of the crime within a five year

5. Seres v. Lerner.[115]—Convicted killer Jimmy Lerner wrote a book while he was incarcerated in the Nevada State Prison, which recounted his life in prison and "contained descriptions of the events surrounding the killing" of his victim.[116] The victim's sister brought suit on behalf of their mother under Nevada's Son of Sam law.[117] The law allowed a victim to bring an action "which arises from the commission of a felony, against the person who committed the felony within [five] years after the time the [criminal] . . . becomes legally entitled to receive proceeds for any contribution to any material that is based upon or substantially related to the [crime] . . . against that victim."[118]

Although the state attorney general argued that the law was simply an enlargement of the statute of limitations for tort actions brought by victims of crime, the Nevada Supreme Court disagreed and applied *Simon & Schuster.*[119] The court stated that Nevada's Son of Sam law "allows recovery of proceeds from works that include expression both related and unrelated to the crime, imposing a disincentive to engage in public discourse and nonexploitative discussion of it" and was, therefore, overinclusive under *Simon & Schuster's* strict scrutiny analysis.[120]

III. SENATOR CORNYN'S APPROACH

The proposed "Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007"[121] was introduced in the United States Senate by Senator John Cornyn on May 24, 2007,[122] and introduced in the United States House of Representatives by co-sponsors, Congressmen Dave Reichert (R-Washington) and Brad Ellsworth (D-Indiana), on September 25, 2007.[123] The bill represents a new approach for advancing those two compelling state interests identified in *Simon & Schuster*—ensuring that criminals do not profit from their crimes and compensating victims.[124] The bill provides, in part, that

> any person who, while incarcerated in a prison, knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail, any

---

period, be turned over to the state's crime victims restitution fund, forcing a convicted felon to "give up speech-related income for the benefit of *crime victims generally*, even after his own victims have been compensated." *See id.* at 731 n.17.

115. 102 P.3d. 91 (Nev. 2004).

116. *Id.* at 92.

117. *Id.*

118. NEV. REV. STAT. § 217.007 (1993), *construed in Seres*, 102 P.3d at 94.

119. *See Seres*, 102 P.3d at 99.

120. *Id.* at 100.

121. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. (2007).

122. *See* 153 CONG. REC. S6,844-01 (daily ed. May 24, 2007).

123. *See* 153 CONG. REC. H10,762-03, H10,763-02 (daily ed. Sept. 25, 2007).

124. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118-19 (1991).

> property, article, or object, with intent that the property, article, or object be placed in interstate or foreign commerce, shall be fined under this title and imprisoned not less than 3 years and not more than 10 years. Any sentence imposed under this subsection shall run consecutive to any other sentence imposed.[125]

Rather than target proceeds as they are earned, this bill attempts to prevent prisoners from earning any money in the first place.[126]

Senator Cornyn made no remarks on the record when he introduced the bill in the Senate,[127] but his co-sponsors, both of whom are former law enforcement officers, spoke on behalf of the proposed law in the House of Representatives.[128] Their remarks reveal the bill's intended purpose.[129] By no coincidence, the bill was introduced in the House on the National Day for Remembrance for Murder Victims.[130] Congressman Ellsworth spoke of his experience in law enforcement where he "saw firsthand the devastation violent crimes bring to victims and their families and to the communities where they occur."[131] He professed "the need to defend victims rights in the aftermath of their unspeakable loss."[132] He declared that the proposed legislation would "prohibit America's *most heinous criminals and murderers*" from exploiting their crimes "by preventing criminals from selling their wares in public auction."[133]

Congressman Reichert was no less passionate with his remarks. He also recognized that day as a "National Day of Remembrance for Murder Victims" and recounted the "pain on the faces of victims and victims[']' families, unexplainable, unimaginable pain that covers their faces and their families for the rest of their [lives]."[134] He expressed both his concern over prisoners "using their fame and notoriety to make a buck," and his disdain for the "industry coined as 'murderabilia,' where tangible goods owned and/or created by convicted murderers are sold for their profit."[135] He added that this proposed legislation "aims to shut down this business."[136]

Congressman Ellsworth's references to "America's most heinous criminals"[137] and "victims of violent crimes"[138] reveal that he is primarily

---

125. S. 1528, § 2(a).
126. *Id.*
127. *See* 153 CONG. REC. S6,844-01 (daily ed. May 24, 2007).
128. *See* 153 CONG. REC. H10,762-03, H10,763-02 (daily ed. Sept. 25, 2007).
129. *See id.*
130. *See id.*
131. 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007) (statement of Rep. Ellsworth).
132. *Id.*
133. *Id.* (emphasis added).
134. 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007) (statement of Rep. Reichert).
135. *Id.*
136. *Id.*
137. 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007).
138. *Id.*

concerned about murderabilia sales related to violent criminals. Unfortunately, the bill does not distinguish between violent and non-violent criminals, nor does it make allowance for the fact that some crimes are victimless.[139] It seeks to impose its restrictions on *all prisoners*, regardless of the crimes they committed.[140] Additionally, although this bill does not specifically target speech, it necessarily restricts free speech through the sweeping language in its provisions. An examination of the bill's constitutional implications is, therefore, worthwhile.

A. The First Amendment

The Supreme Court held that the original Son of Sam law violated the First Amendment right to free speech.[141] Applying strict scrutiny, it also determined that because the regulation was content-based it must be "narrowly tailored to advance" a compelling state interest in order to survive a constitutional challenge.[142] "[E]ven regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[143] Whether the bill is deemed a content-based or content-neutral regulation determines the level of scrutiny to which it would be subjected if it were adopted and subsequently challenged.[144]

On its face, Senator Cornyn's bill does not appear to be a prohibition against free speech, but rather a prohibition against prisoners making money.[145] By preventing prisoners from delivering or mailing items for the purpose of sale beyond the prison gates,[146] the bill seeks to avoid the content-based element that

---

139. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S.1528, 110th Cong. (2007).

140. *Id.* § 2(a).

141. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991).

142. *Id.* at 121.

143. *Id.* at 117 (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983)).

144. *See* State *ex rel.* Napolitano v. Gravano, 60 P.3d 246, 253 (Ariz. Ct. App. 2002) (stating that content-neutral regulations of speech are subject to an intermediate level of scrutiny, thus they must further an important governmental interest that is unrelated to the suppression of free speech and any incidental burden on free speech must not be greater than necessary to further that interest); Seres v. Lerner, 102 P.3d. 91, 96 n.31 (Nev. 2004) (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986)).

145. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S.1528, 110th Cong. § 2(a) (2007).

146. *Id.* The bill does include exceptions, allowing the mailing or delivery of an item if the purpose

> is to satisfy debt that is—(A) imposed by law or a court order, including—(i) support obligations; (ii) property taxes; (iii) income taxes; (iv) back taxes; (v) a legal judgment, fine, or restitution; (vi) fees to cover the cost of incarceration, including fees for health

existed in the original Son of Sam law and its progeny.[147] In those laws, now deemed unconstitutional, the target was expressive activity specifically related to the crime committed by the speaker.[148] This proposed law neither singles out expressive activity, nor makes any reference to the content of the speech.[149] Its all-inclusiveness, however, necessarily regulates expressive activity.

The Supreme Court has stated that "the State may . . . enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[150] "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[151] Further, a "time, place, or manner regulation may [not] burden substantially more speech than is necessary to further the government's legitimate interests."[152] "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[153]

1. Government Interests.—The government interest suggested by the title of the bill is to stop the sale of murderabilia and protect the dignity of crime victims. The provisions of the bill appear to be designed to advance the two compelling interests identified by the Court—compensating crime victims[154] and preventing criminals from profiting from their crimes.[155] As Andy Kahan, the original proponent of the bill, remarked:

If you [prisoners] want to draw, paint, doodle, sketch, or whatever, feel

---

care while incarcerated . . . ; and (vii) other financial obligations mandated by law or a court order; or (B) incurred through a contract for—(i) legal services; (ii) a mortgage on the primary residence of the immediate family of the prisoner; (iii) the education or medical care of the prisoner or a member of the immediate family of the prisoner; or (iv) life, health, home, or car insurance.

Id. § 2(d)(1).

147. *See, e.g.*, *Simon & Schuster*, 502 U.S. at 116; Keenan v. Superior Court of Los Angeles County, 40 P.3d 718, 729 (Cal. 2002); *Seres*, 102 P.3d. at 96.

148. *See, e.g.*, *Simon & Schuster*, 502 U.S. at 116 (1991); *Keenan*, 40 P.3d at 729; *Seres*, 102 P.3d. at 96.

149. *See* S.1528 § 2(a).

150. Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

151. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)).

152. *Id.* at 799 (citing *Frisby*, 487 U.S. at 485).

153. *Id.*

154. *See* S.1528 § 2(d)(1)(A). The bill makes an exceptions for a mailing or delivery for the purpose of satisfying "a legal judgment, fine, or restitution." *Id.*

155. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118-19 (1991).

> free to do so. You're just not going to make any money off of it. And if you're truly remorseful, then go ahead and ship your artwork out and let all proceeds go back to the victim's [sic] families. You shouldn't make one red cent.[156]

Kahan's passionate concern for victims of violent crime, however admirable, and his disdain for violent criminals, however understandable, do not change the fact that the bill goes far beyond its intended goal of protecting victims from the indignity of seeing crime-related items appear for sale on the Internet. The bill targets all prisoners, regardless of the circumstances surrounding their convictions[157] and prohibits the sale of "any property, article, or object,"[158] regardless of whether the items are related to the prisoners' crimes.

2. Overinclusiveness.—It is questionable whether Senator Cornyn's anti-profiting bill is "narrowly tailored to serve a significant government interest" as required by the Court in a content-neutral time, place, or manner regulation of expression.[159] Although sometimes a law that is broader is better able to withstand constitutional challenge than one that targets a particular activity (especially speech),[160] that may not be the case with the proposed bill. Some of the activity banned by this bill has absolutely no relation to any government interest.[161] The bill applies to all prisoners, regardless of whether their crimes have an identifiable victim.[162] If there is no victim then there may be no one deserving of compensation. The co-sponsors of the bill, as well as its chief proponent, Andy Kahan, all seem to be concerned about victims of violent crimes, specifically murder,[163] and yet their bill makes no distinction between a "cold-blooded, diabolical killing machine"[164] and a person convicted of a victimless crime.[165] Additionally, the bill would affect prisoners who lack any

---

156. *Day to Day*, *supra* note 3.

157. S.1528 § 2(a).

158. *Id.*

159. Frisby v. Schultz, 487 U.S. 474, 481-82 (1988).

160. For instance, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-66 (1991), owners of a bar that featured nude dancing challenged Indiana's public nudity statute, claiming a violation of free speech (because it restricted "expressive" dancing). The Court held the statute constitutional, applying *United States v. O'Brien*, 391 U.S. 367 (1968), and suggesting that the significant government interest was "protecting societal order and morality." *See Barnes*, 501 U.S. at 567-68.

161. By way of example, suppose if a prisoner convicted of drug possession paints a landscape while in prison and wishes to sell it. No identifiable government interest is stymied. The prisoner has neither profited from his crime nor left any victim uncompensated.

162. *See* S.1528 § 2(a).

163. *See* 153 CONG. REC. H10,762-03, H10,763-02 (daily ed. Sept. 25, 2007); *Day to Day*, *supra* note 3. Kahan states: "[T]here's nothing more nauseating and disgusting than to find out the person who murdered one of your loved ones now has items being hawked by third parties for pure profit." *Day to Day*, *supra* note 3.

164. *Day to Day*, *supra* note 3.

165. In a victimless crime, presumably there would be no civil judgment or restitution order

notoriety and whose personal items are not likely to appeal to the consummate murderabilia collector.

Senator Cornyn's bill may be a content-neutral regulation, but like its content-based predecessors, it

> penalizes . . . speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. . . . By this financial disincentive, . . . [it] discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds.[166]

It fails to meet the Court's requirement for a content-neutral, time, place, or manner regulation in that it does not "leave open ample alternative channels of communication."[167] As the Court stated: "By denying compensation for an expressive work, a law may chill not only the free speech rights of the author or creator, but also the reciprocal First Amendment right of the work's audience to *receive* protected communications."[168] For many of the activities banned by this bill, there is no significant government interest to justify the prohibition and the "practical effect . . . [of the bill would be] to chill a wide range of expression."[169]

B. Applying Turner v. Safley[170]

A section of the proposed bill provides that "[t]he Director of the Bureau of Prisons and the head of the department of corrections, or other similar agency, for any State may promulgate uniform guidelines to restrict the privileges of any person that violates this section."[171] Consequently, if the bill were adopted, enforced, and challenged, a target of that challenge could be a prison administrator who imposed sanctions on a prisoner. It is beneficial, therefore, to analyze the constitutionality of the bill under the Supreme Court's holding in *Turner v. Safley*,[172] where the Court held that prison regulations that impinge on

---

resulting from the crime, and hence no uncompensated victim.

166. Keenan v. Superior Court of Los Angeles County, 40 P.3d 718, 731 (Cal. 2002).

167. Frisby v. Schultz, 487 U.S. 474, 481 (1988). The only way for a prisoner to sell a tangible item (other than a written work, which could be e-mailed if the prisoner had computer access) is to deposit the item for mailing or delivery. Hence, there is no alternative channel of communication left open by the proposed legislation.

168. *Keenan*, 40 P.3d at 729 n.15 (citing Va. Pharmacy Bd. v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976)).

169. *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 349 (Mass. 2002).

170. 482 U.S. 78 (1987).

171. Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(c) (2007).

172. *Turner*, 482 U.S. at 89. It must be noted that the Court might analyze a First Amendment challenge to the bill just as it would any other First Amendment case. In *Johnson v. California*, 543 U.S. 499, 500 (2005), a prisoner rights case, Justice O'Connor rejected the use of a *Turner* analysis, saying, "The right not to be discriminated against based on one's race is not susceptible to *Turner's*

the constitutional rights of prisoners must be "reasonably related to legitimate penological interests."[173]

In *Turner*, the Court stated that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[174] but it also acknowledged the challenges facing prison administrators.[175] The Court identified as its task: "[T]o formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'"[176] The Court adopted a "lesser standard of scrutiny" than applied by the Eighth Circuit,[177] and devised four factors relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration[178] withstands constitutional challenge:

> whether the regulation has a "valid, rational connection" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation.[179]

An analysis of Senator Cornyn's bill, using the lowered standard of scrutiny set out in *Turner* reveals that the bill would probably not survive. There is a valid rational connection between the provisions of the bill and the two government interests identified by *Simon & Schuster*.[180] The bill prohibits prisoners from mailing or otherwise delivering any item with the intent that the item "be placed in interstate or foreign commerce,"[181] thereby preventing any

---

logic . . . ." *See* Trevor N. McFadden, Note, *When to Turn to* Turner*? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 150 (2006) (asserting that *Turner* signified a "judicial retreat from the protection of prisoners' rights" but notes that the Court has refused to apply *Turner* to certain constitutional claims such as the equal protection claim in *Johnson*). *Id.* at 135-36.

173. *Turner*, 482 U.S. at 89.

174. *Id.* at 84.

175. *See id.* at 85.

176. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989)).

177. *Id.* at 81. The Eighth Circuit Court of Appeals had applied a "strict scrutiny analysis." *Id.*

178. In *Simon & Schuster*, the Court struck down the New York's Son of Sam law because it violated the First Amendment rights of prisoners. This seems to establish that those rights do survive incarceration. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

179. Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (quoting *Turner*, 482 U.S. at 89-91).

180. *See Simon & Schuster*, 502 U.S. at 118-19 (identifying two compelling state interests: (1) "ensuring that criminals do not profit from their crimes"; and (2) "ensuring that victims of crime are compensated by those who harm them").

181. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007,

profiting from their crimes. There is an exception to the prohibition when the profit is used to pay restitution, fines, or civil judgments, which promotes the compensation of victims.[182] Where the bill runs into trouble is with the remaining three factors. If a prisoner wishes to sell something outside the prison walls, there is no alternative to "knowingly deposit[ing] [the object] for mailing or delivery."[183] By contrast, in *Overton v. Bazzetta*,[184] when the Court considered a challenged prison regulation that limited prisoners' visitors, it pointed out that "inmates can communicate with those who may not visit by sending messages through those who are allowed to visit" as well as "communicate . . . by letter and telephone."[185]

A consideration of the third *Turner* factor—the impact on prison staff, prison resources, and other inmates of allowing the prisoner to exercise his or her rights[186]—reveals that this bill is unrelated to the operation of prisons. In *Overton*, the Court found that removing the restriction on visitors "would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls."[187] If this new law were adopted, prison officials would likely have to play a role in its enforcement. For example, additional monitoring of outgoing mail and other deliveries. This notion, combined with the fact that the bill does not address any security issues within prisons, demonstrates that prison administrators are better off without it.

Finally, the last step in the *Turner* analysis is to determine whether the regulation is reasonable because of the "absence of ready alternatives."[188] There are reasonable alternatives to Senator Cornyn's proposed bill that do not impinge on prisoners' constitutional rights, but still provide for the compensation of victims.[189] For instance, a law that targets any proceeds from a crime as opposed to *all income* that a prisoner might earn during incarceration resolves the constitutional problems of *Simon & Schuster* while making funds available for victim compensation.[190]

In *Turner*, the Court described a Missouri prison regulation restricting a prisoner's right to marry as "an *exaggerated response* to . . . security objectives" that "sweeps much more broadly than can be explained by petitioners' penological objectives."[191] Likewise, the proposed "Stop the Sale of

---

S. 1528, 110th Cong. § 2(a) (2007).

182. *See id.* § (2)(d)(1)(A).

183. *See id.* § 2(a).

184. *Overton*, 539 U.S. at 126.

185. *Id.* at 135.

186. Turner v. Safley, 482 U.S. 78, 90 (1987).

187. *Overton*, 539 U.S. at 135.

188. *Turner*, 482 U.S. at 90.

189. *See infra* Part V.

190. *See, e.g.*, State *ex rel.* Napolitano v. Gravano, 60 P.3d 246, 257 (Ariz. Ct. App. 2002) (holding law targeting the proceeds of racketeering constitutional).

191. *Turner*, 482 U.S. at 97-98 (emphasis added).

Murderabilia to Protect the Dignity of Crime Victims Act of 2007" can be characterized as an exaggerated response to the sale of murderabilia. The bill's primary purpose is to spare victims and their families from the pain of public auction of memorabilia related to the crimes against them, and to avoid the pain of the knowledge that the perpetrators of the crimes are making a profit.[192] In an attempt to accomplish those goals, they have fashioned a law with serious constitutional weaknesses. A First Amendment content-neutral speech regulation analysis reveals that the bill is overinclusive in that it "burden[s] substantially more speech than is necessary to further the government's legitimate interests."[193] When analyzed as a prison regulation under *Turner*, the bill again fails to pass muster. In addition to the constitutional issues raised by this bill, there are some potential, possibly unintended, ramifications that add weight to the argument that it is an exaggerated response to the problem of murderabilia sales.

IV. COLLATERAL EFFECTS OF THE BILL

When Senator Cornyn's co-sponsors introduced the bill on the floor of the United States House of Representatives, they expressed concern about "tangible goods owned and/or created by convicted murderers [being] sold for their profit,"[194] and stressed "the need to defend victim[s'] rights in the aftermath of their unspeakable loss."[195] In support of those victims, however, they propose a bill whose provisions target *all prisoners*, regardless of whether they have been convicted of a violent crime and whether there are victims to whom the prisoners owe some form of compensation.[196] The overinclusiveness of the bill, as well as the sanctions it includes for violation of its provisions,[197] necessarily lend themselves to unintended consequences, including: difficulty for victims in obtaining the compensation that is due them; a stifling of prison art programs; and challenges in enforcing the provisions of the bill.

A. Restitution and Victim Compensation

Compensation for victims is a compelling state interest, whether it comes from adherence to a restitution order or as a damages award brought by the victim in a civil action against the perpetrator.[198] The Supreme Court expressed concern for victims when it acknowledged, in *Simon & Schuster*, the State's

---

192. *See* 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007); 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007).

193. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

194. 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007) (statement of Rep. Reichert).

195. 153 CONG. REC. H10,762-03 (daily ed. Sept. 25, 2007) (statement of Rep. Ellsworth).

196. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(a) (2007).

197. *Id.* § 3.

198. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991). Regarding the compelling interest of compensating victims, the Court notes that "[e]very State has a body of tort law serving exactly this interest." *Id.*

"interest in preventing wrongdoers from dissipating their assets before victims can recover."[199] Senator Cornyn's proposed law provides exceptions to the prohibition against prisoners selling items. Included in those exceptions are sales for the purpose of satisfying a debt that is "a legal judgment, fine, or restitution."[200] The bill also provides that when a prisoner violates the law (i.e., the prisoner mails or delivers some item with intent that the item be placed in interstate or foreign commerce),[201] the victim may bring a civil suit to recover damages.[202] The law does not, however, provide that the proceeds earned from the sale be held in escrow to satisfy that civil award.[203] It provides no mechanism for ensuring that those profits are transferred to the victim. On the contrary, any funds earned from violation of the law are to be forfeited to the United States.[204] So, if a crime victim is harmed by the sale of some item related to the perpetrator of the crime against him or her, a civil remedy is available, but there is no guarantee that funds will be available to satisfy any awarded damages.

B. Rehabilitation Interests

In 1983, Phyllis Kornfeld took a job teaching art to inmates in three Oklahoma State penitentiaries and began a life-long career helping prisoners express themselves through art.[205] In an account of her experiences, she states, "Personally, it is always an illuminating exciting event to see the prisoners discover something very positive, and mysterious, coming from inside themselves. The art is often miraculously fresh, and despite the context, there is a lot of joy."[206] She adds that "[s]o many of the prisoners are overtaken with creative force as soon as they get their hands on the materials, . . . and all I have to do is get out of the way."[207] One website where prisoners can sell their art describes itself as "an open and uncensored forum networking prisoners, prisons and the world."[208] On its Prison Art page, it highlights artists including: "Kaliman" (described as "one of the most prolific artists to emerge out of today's prison system [whose] . . . artwork reaches deep into the souls of incarcerated

---

199. *Id.*; *see* Keenan v. Superior Court, 40 P.3d 718, 736 (Cal. 2002) (Brown, J., concurring) (stating that "[t]he constitutionality of seizing a criminal's assets to compensate his victims is beyond dispute").

200. S.1528 § 2(d)(1)(A)(v).

201. *Id.* § 2(a).

202. *Id.* § 5.

203. *See id.*

204. *Id.* § 3.

205. CellblockVisions.com, Prison Art in America—About Phyllis Kornfeld, http://www.cellblockvisions.com/about.html (last visited Oct. 16, 2008).

206. *Id.*

207. *Id.*

208. PrisonerLife.com, http://prisonerlife.com/prisonart/prisonart.cfm (last visited Oct. 16, 2008).

men and women");[209] "Raymond Gray" (who "has spent more than [twenty-nine] years in prison," "learned from life, and hard times, and even from love" and whose "artwork reflects all of these");[210] and "Iqbal Karimii" (who "developed his skills while incarcerated, and . . . [who has] since created hundreds of paintings specializing in landscapes, seascapes, portraits, and wild life" as "his way of communicating").[211]

Ed Mead, the proprietor of prisonart.org,[212] one of many websites where prisoners can sell their arts and crafts (and which will become illegal if Senator Cornyn's bill is passed)[213] said in an interview with National Public Radio:

> One of the reasons that these guys are in there is because they have this low self-esteem, this low opinion of themselves. And while they're in their families are often on welfare or could use some assistance. Or these guys could need to save money for their release and to help them out and ease the burden. So you know, if you can help them out, what's the downside?[214]

This seems like a legitimate question, particularly considering that Mead has rules about what he will allow to be sold on his site—"nothing he considers racist, sexist or homophobic."[215]

An increase in personal income does not appear to be the only factor motivating prisoners who create art while in prison. Jimmy Lerner, while incarcerated for committing manslaughter, wrote a book entitled *You Got Nothing Coming—Notes from a Prison Fish* and included this comment in the forward to the paperback edition: "Money was not a factor in writing the book. I wrote to save my sanity, to save my life. For a long time I was just keeping a diary, a journal. I finally wanted it published because I felt I had something important to say."[216]

Another program that would be discontinued under the proposed law is Art Behind Bars (ABB), which was started in Florida and is described on its website as an "Art-Based Community Service Since 1994."[217] Through its "skill-based training and art education," ABB aims to "give inmates the opportunity to

---

209. *Id.*

210. *Id.*

211. *Id.*

212. PrisonArt.org, http://prisonart.org (last visited Oct. 16, 2008).

213. At least it would be illegal for a prisoner who sells artwork for a purpose other than to satisfy one of the debts included in the bill's exceptions. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(d)(1) (2007).

214. *Day to Day*, *supra* note 3.

215. *Id.*

216. Seres v. Lerner, 102 P.3d. 91, 100 n.52 (Nev. 2004) (quoting *Foreword to* JIMMY LERNER, YOU GOT NOTHING COMING—NOTES FROM A PRISON FISH, at xv (Broadway Books 2003). On the home page of the website for prisonart.org, there is quote from Pablo Picasso: "We artists are indestructible; even in a prison." PrisonArt.org, *supra* note 212.

217. ArtBehindBars.org, http://www.artbehindbars.org/ (last visited Oct. 16, 2008).

contribute to society through the donation of artwork to numerous non-profit organizations."[218] Proceeds from the direct sale of prisoner-made artwork "go back into the program to purchase art supplies," and the program boasts of having raised more than $75,000 for various charities by the donation of art.[219] A prisoner donating an item to a charity, knowing that the item would be auctioned off, would violate Senator Cornyn's bill.[220] Such collateral effects were likely not foreseen by the proponents of the bill. Moreover, there is insufficient evidence to suggest that they would argue that these programs have no socially redeeming value and should be discontinued. Society has nothing to lose and everything to gain by allowing prisoners to receive training while incarcerated, and in the process, contribute to charitable causes.

C. Problems with Enforcement and Effectiveness

The proposed anti-profiting legislation forbids prisoners from mailing or otherwise delivering any item with the intent that the item be placed in interstate commerce.[221] It allows exceptions for items that are sold to satisfy certain (primarily government-imposed) debts.[222] One question arises as to how this law would be enforced. Are prison officials equipped to monitor outgoing mail to the extent that they can discern whether a prisoner has the requisite intent that the item he or she is mailing be placed in interstate commerce? Even if they can determine that the intent exists, their job does not end there. The bill allows inmates to sell items if the sales are used to pay off certain debts.[223] Who, then, is going to monitor these sales to make sure that the proceeds are used lawfully?

Another question arises as to the effectiveness of this bill. Its proponents have suggested that it will "shut down this business" of murderabilia sales on the Internet.[224] There are at least a couple of instances, however, where that would not happen, even if the bill was enacted into law. First, because of the exceptions provided in the bill,[225] a truly violent, vicious criminal who is driven not by financial incentive, but rather by a dark desire to further torment his victims and their families, and to gain notoriety for himself, could put anything out there for public consumption, no matter how distasteful, regardless of whether it is related

---

218. ArtBehindBars.org, Learn More, http://www.artbehindbars.org/index.php?option=com_content&task=view&id=23&itemid=37 (last visited Oct. 16, 2008) [hereinafter ArtBehindBars.org, Learn More]. Organizations that have benefited from the ABB program include Habitat for Humanity, Take Stock in Children, and AIDS Help. *Id.*

219. ArtBehindBars.org, Learn More, *supra* note 218.

220. *See* Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007, S. 1528, 110th Cong. § 2(a) (2007). An auction could conceivably place an item in interstate commerce.

221. *See id.*

222. *See id.* § 2(d)(1).

223. *See id.*

224. 153 CONG. REC. H10,763-02 (daily ed. Sept. 25, 2007) (statement of Rep. Reichert).

225. *See* S. 1528 § 2(d)(1).

to his crime or his victims. As long as the funds are used to satisfy a debt identified in the exceptions to the bill,[226] those murderabilia sales would be beyond its reach.

Further, if an inmate mails or delivers an item to a family member or friend, without any intent that the item be sold, and that family member or friend decides to auction off the item on the Internet, again, the bill would have no reach—it would be ineffective in stopping the sale of murderabilia.

V. DRAFTING AN EFFECTIVE AND CONSTITUTIONAL LAW

The United States Supreme Court in *Simon & Schuster* held New York's Son of Sam law unconstitutional because it regulated speech based on its content—a violation of the First Amendment.[227] In the years since then, some states have attempted to amend their own Son of Sam laws to comply with *Simon & Schuster* with little success.[228] Senator Cornyn's proposed bill, while it eliminates the content-based speech problem of the New York law, may not be narrowly tailored enough to withstand a constitutional challenge.[229] It may not be possible to draft a law that would prevent *every* prisoner from profiting from his or her crime while providing compensation to *every* victim, but some states approach that goal.[230]

A. One Approach—Targeting All Proceeds of a Crime

One of the issues the Supreme Court had with the New York Son of Sam law was that it forfeited only profits earned from the *depiction* of a crime, which made it a content-based speech regulation.[231] Texas attempted to resolve the constitutional issue by targeting proceeds from items owned by a criminal whose value is enhanced by the criminal's notoriety.[232] A North Carolina law attempts to reach the same result by targeting income "generated from the commission of a crime."[233] Finally, an Arizona law that targets all *proceeds* from a crime has

---

226. *Id.*

227. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

228. *See supra* Part II.B.

229. *See supra* Part III.A.2.

230. *See, e.g.*, *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 347 (Mass. 2002). The proposed bill targeted proceeds from a crime. The court noted that portions of the bill that regulated non-expressive activity "would not violate or otherwise impinge on the right of freedom of speech." *Id.*

231. *Simon & Schuster*, 502 U.S. at 116.

232. Tracey B. Cobb, Comment, *Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 HOUS. L. REV. 1483, 1505 (2003).

233. Melissa J. Malecki, Comment, *Son of Sam: Has North Carolina Remedied the Past Problems of Criminal Anti-Profit Legislation?*, 89 MARQ. L. REV. 673, 687 (2006) (quoting N.C. GEN. STATE. § 15B-31 (2005)).

been upheld as constitutional by that state's court of appeals.[234]

1. State v. Gravano.[235]—Arizona successfully obtained the proceeds from "Sammy the Bull" Gravano's book about his life in organized crime without invoking its Son of Sam law.[236] Gravano was convicted in New York on a racketeering charge and was allowed to enter the federal Witness Protection Program. He was subsequently arrested in Arizona for distributing ecstasy.[237] Charged with racketeering in Arizona, Gravano was subject to civil forfeiture under the Arizona Racketeering Act and the Arizona Forfeiture Reform Act.[238] Those laws authorized the State to "seize any property that constituted the proceeds of racketeering."[239]

The state successfully seized money, guns, jewelry, cellular phones, and a vehicle from Gravano.[240] The State then sought forfeiture of all of Gravano's rights and benefits in connection with "the non-fiction work about Gravano's life that was written by Peter Maas, published by Harper Collins (UK), Inc., in 1997, and entitled *Underboss: Sammy the Bull Gravano's Story of Life in the Mafia ('Underboss').*"[241] Gravano's First Amendment challenge to the forfeiture of profits from the book failed when the trial court determined that the "*Underboss* proceeds were traceable to racketeering because 'the proceeds would not exist were it not for Mr. Gravano's criminal activities in New York' and because those activities would also violate Arizona's racketeering laws."[242] The appeals court affirmed and determined that the statutes were content-neutral regulations that "come into play based on the existence of a causal connection between racketeering and property."[243] The statutes serve the purpose of "removing the economic incentive to engage in racketeering, reducing the financial ability of racketeers to . . . engage in crime, . . . compensating victims of racketeering, and reimbursing the State for the costs of prosecution."[244]

2. The Texas Murderabilia Amendment.—In 2001, in an attempt to comply with the holding in *Simon & Schuster*, Texas amended its Son of Sam law and "expanded the scope of the law to cover the value of tangible goods owned by a criminal that is increased due to the notoriety of the criminal."[245] Unlike Son of Sam laws that targeted only expressive activity related to the crime, this amendment targets murderabilia and "focuses on the increased value an item

---

234. State *ex rel.* Napolitano v. Gravano, 60 P.3d 246, 253 (Ariz. Ct. App. 2002).

235. *Id.*

236. *See id.* at 249 n.1.

237. *See id.* at 248.

238. *See id.* at 249 (discussing ARIZ. REV. STAT. ANN. §§ 13-2301 to -2318 (2001 & Supp. 2002); ARIZ. REV. STAT. ANN. §§ 13-4301 to -4316 (2001 & Supp. 2002)).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 253.

244. *Id.*

245. Cobb, *supra* note 232, at 1505.

gains from the commission of a crime."[246] It "looks not at the item's relation to a crime, but rather at how much more valuable the item becomes as a result of someone committing a crime."[247] The amendment escapes the content-based regulation problem by targeting "fruits of the crime" regardless of the content.[248] However, it creates a new problem. Difficulties will likely arise when measuring to what extent the value of an object was enhanced by the criminal's notoriety. A similar "enhanced notoriety" provision existed in the California statute overturned by *Keenan*, but because that particular provision was not at issue, the court did not address it.[249]

3. More State Responses to Simon & Schuster.—North Carolina created a new Son of Sam law that targets income "'generated from the commission of a crime' including that gained 'from the sale of crime memorabilia or obtained through the use of unique knowledge obtained during the commission' of a crime."[250] As Justice Brown opined in *Keenan*, "a limitation on the law's scope to storytelling is the achilles' heel of a Son of Sam provision."[251] In his concurring opinion he pointed out that Virginia law

> seizes "[a]ny proceeds or profits received . . . by a defendant . . . from any source, as a direct or indirect result of his crime or sentence, or the notoriety which such crime or sentence has conferred upon him." Regardless of whether a Virginia criminal profited by selling her account of the crime, her autograph, or her furniture for an exorbitant price, she could not enjoy such revenues under this law.[252]

By eliminating expressive activity as the sole target, these laws have a better chance of surviving constitutional challenge. The courts and law enforcement are still faced with the challenge of determining or measuring notoriety resulting from the commission of a crime—a somewhat abstract quality that is not easily gauged. Perhaps one solution to this dilemma is to focus not solely on the means by which a criminal earns money and instead put more emphasis on the other compelling state interest identified by the Court in *Simon & Schuster*—compensating victims.[253]

---

246. *Id.* at 1506.

247. *Id.* at 1506-07. As an example, if a prisoner were able to command a tidy sum from the sale of a photo of himself or herself due to the prisoner's notoriety, the prisoner would be allowed to keep only "the amount of money the photo would have fetched absent the notoriety gained by the commission of the crime." *Id.* at 1507.

248. *Id.* at 1506, 1509.

249. *See* Keenan v. Superior Court of Los Angeles County, 40 P.3d 718, 721 (Cal. 2002).

250. Malecki, *supra* note 233, at 687 (quoting N.C. GEN. STAT. § 15b-31(9) 2005)).

251. *Keenan*, 40 P.3d at 738 (Brown, J., concurring).

252. *Id.* (citing VA. CODE. ANN. § 19.2-368.20) (1992), *reprinted in* VA. CODE ANN. § 19.2-368.20 (2008)).

253. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

B. Compensating Victims—A Focus on Restitution and Satisfaction of Civil Judgments

"[T]he State has a compelling interest in ensuring that victims of crime are compensated by those who harm them."[254] The *Simon & Schuster* Court pointed out that "[e]very State has a body of tort law serving exactly this interest," and further, that "[t]he State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of . . . statutory provisions for prejudgment remedies and orders of restitution."[255] The Massachusetts Supreme Court also suggested that there were "less cumbersome" ways of "compensating victims and preventing notorious criminals from obtaining a financial windfall from their notoriety."[256] These methods include

> [p]robation conditions, specifically designed to deal with a defendant's future income and obligations . . . [and] writs of attachment against the defendant's assets [brought by victims as part of a civil action] or writs of trustee process of amounts owed to the defendant, including (but not limited to) assets or earnings derived from expressive activity.[257]

Law professor and Federal District Judge Paul Cassell points out that "nothing in the First Amendment forbids a judge from imposing as part of a defendant's sentence the condition that the defendant shall not profit from his crime."[258] He recommends that Congress pass a new federal anti-profiting statute—following the approach of Arizona's law—that "forbids profiting from a federal crime in any way—not profiting solely through protected First Amendment activities."[259] Additionally, and perhaps more critical to advancing the interest of victim compensation, he suggests that the federal restitution statute, which is "restricted to situations where a defendant is incarcerated," be expanded to include the following language:

> If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source,[260] including inheritance, settlement, or other judgment, during a period of incarceration, supervised release, or probation, such person shall be required to apply the value of such resources to any restitution or fine still owed.[261]

Judge Cassell argues that an expansion of the period of time (to include supervised release and probation) in which a convicted criminal is subject to the federal restitution statute, would prevent criminals from profiting from their

---

254. *Id.*
255. *Id.*
256. *In re* Opinion of the Justices to the Senate, 764 N.E.2d 343, 350 (Mass. 2002).
257. *Id.*
258. Cassell, *supra* note 57, at 120.
259. *Id.* at 122.
260. This would not limit the source of victim compensation only to proceeds from the crime.
261. Cassell, *supra* note 57, at 123.

crimes and increase the chances for victim compensation.[262]

C. Combining Approaches—A Possible Solution

The trend among the states of amending their anti-profiting laws so that they target any proceeds that a criminal earns from the commission of his or her crime[263] is a positive step toward ensuring that criminals do not profit from their crimes. Arizona has shown that such a law can withstand a First Amendment challenge.[264] This type of law would also prevent prisoners from profiting from murderabilia sales—a major concern of Senator Cornyn and other proponents of his bill. It would do so without restricting the First Amendment rights of prisoners who are not attempting to exploit their crimes, but merely trying to survive in prison and perhaps prepare themselves for the day they obtain release.

Additionally, the law should grant the state the authority to seize the assets of any prisoner against whom a restitution order, fine or *civil judgment*[265] is entered and to transfer those funds to the appropriate entity. Much like the provisions in the federal restitution statute,[266] a state should be allowed to seize funds in such cases regardless of how they were earned. A combination of these approaches would address the two compelling interests identified in *Simon & Schuster*.[267] First, a law modeled after Arizona's anti-racketeering statute[268] that allows the state to seize any profits resulting from the commission of a crime ensures that prisoners do not profit from their crimes. Second, a restitution law that allows *any* income seized under an outstanding restitution order, fine, or civil judgment to be transferred to the victims provides a mechanism for victims to receive the compensation owed them.

CONCLUSION

The proposed "Stop the Sale of Murderabilia to Protect the Dignity of Crime Victims Act of 2007" is not a reasonable way to stop the sale of crime memorabilia. Its overinclusiveness invites a constitutional challenge if the bill is passed. Expanding state Son of Sam laws to include all proceeds from a crime,

---

262. *Id.*

263. *See, e.g.*, State *ex rel.* Napolitano v. Gravano, 60 P.3d 246 (Ariz. Ct. App. 2003); Cobb, *supra* note 232, at 1509; Malecki, *supra* note 233, at 687.

264. *See Gravano*, 60 P.3d 246 at 248.

265. Civil judgment is not included in the federal statute, however, its addition would help victims of violent crimes (or their families) collect on civil judgment awards before prisoners can dissipate their earnings.

266. *See* 18 U.S.C. § 3664(n) (2006).

267. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991).

268. *See* ARIZ. REV. STAT. ANN. §§ 13-2301 to -2318 (2001 & Supp. 2002); ARIZ. REV. STAT. ANN. §§ 13-4301 to -4316 (2001 & Supp. 2002).

combined with providing for seizure of prisoner assets to satisfy restitution orders and civil judgments has a better chance of meeting those two compelling interests identified by the Court—compensating victims and ensuring that criminals do not profit from their crimes—without running afoul of the U.S. Constitution.

THE EFFECT OF INDIANA CODE SECTION 22-9-1-16 ON EMPLOYEE CIVIL RIGHTS

KATHRYN E. OLIVIER*

INTRODUCTION

Violations of employee civil rights are fundamentally unfair. To protect employees and prevent discriminatory behavior, States have passed civil rights laws which affect every working citizen in the jurisdiction. Indiana's default procedure in civil rights cases is an administrative hearing conducted by the Indiana Civil Rights Commission (ICRC) and presided over by an administrative law judge (ALJ).[1] In some situations, an alternative procedure allows an injured party to avoid the administrative hearing and institute a civil suit.[2] If the ICRC has probable cause to believe that there was a civil rights violation,

> [a] respondent or a complainant may elect to have the claims that are the basis for a finding of probable cause decided in a civil action . . . . However, both the respondent and the complainant must agree in writing to have the claims decided in a court of law . . . . The election may not be made if the commission has begun a hearing on the record under this chapter with regard to a finding of probable cause.[3]

Deviation from the administrative process is uncommon because the Indiana Code requires written consent from both parties before the civil suit commences.[4] Nonetheless, in the unlikely event that a complainant obtains the respondent's consent, another provision of the Indiana Code mandates that the case be tried by a judge, not a jury.[5] Even if the employee wins the case, his damages are limited to "wages, salary, or commissions."[6] Furthermore, he cannot recover his attorney's fees.[7] Thus, the combined effect of these statutes unfairly biases state

---

* J.D. Candidate, 2009, Indiana University School of Law—Indianapolis; B.A., 2005, DePauw University, Greencastle, Indiana. I would like to thank Professor Jennifer Drobac, Executive Notes Editor Kate Shelby, and Note Development Editor Chris Eckhart for their guidance and advice throughout the writing of this Note. Additionally, I would like to thank my family and friends for their patience, support, and encouragement.

1. *See* M.C. Welding & Machining Co. v. Kotwa, 845 N.E.2d 188, 192 n.3 (Ind. Ct. App. 2006).

2. IND. CODE § 22-9-1-16 (2007).

3. *Id.*

4. *Id.* § 22-9-1-16(a).

5. *Id.* § 22-9-1-17(c).

6. *Id.* § 22-9-1-6(k)(A).

7. *See* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 n.3 (Ind. Ct. App. 1997), *overruled on other grounds by* 714 N.E.2d 623 (Ind. 1999). In a strongly-worded footnote, the court criticized the ICRC's "continued expenditure of public funds to . . . relitigate an established rule of law." *Id.* The court emphasized that the ICRC should "present its request to the legislature." *Id.*

civil rights proceedings against complainants.

This Note discusses the procedural weaknesses of Indiana's civil rights law and suggests modifications to Indiana's law based on the civil rights laws of Ohio, Illinois, Kentucky, and Michigan. Part I of this Note explains the employment-at-will doctrine and discusses how Indiana courts have limited its breadth. Part II examines the Indiana Civil Rights Law, specifically the portions that focus on employee's rights. Part III explores Title VII of the Civil Rights Act of 1964 (Title VII),[8] the federal civil rights law, and identifies why Title VII does not provide protection in all employment settings. Part IV surveys the civil rights laws of Ohio, Illinois, Kentucky, and Michigan to provide illustrations of other civil rights laws. Finally, Part V advocates for a change in Indiana's civil rights law to incorporate the strengths of the Illinois, Kentucky, Ohio, and Michigan approaches.

I. EMPLOYMENT LAW IN INDIANA

Indiana adheres to the employment-at-will doctrine.[9] Under this doctrine, if an employment contract is not for a definite period then the employment is at will and is terminable by either party at any time, with or without cause.[10] In other words, the doctrine "permits both the employer and the employee to terminate the employment at any time for a 'good reason, bad reason, or no reason at all.'"[11] Despite the harshness of the doctrine, Indiana courts have been generally unwilling to adopt exceptions to mitigate its effect.[12]

However, if the employee was discharged because he exercised a statutorily-conferred right, then his discharge is considered retaliatory and the courts recognize an exception to the general rule.[13] Thus, the court permitted the plaintiff in *Frampton v. Central Indiana Gas Co.*[14] to bring a civil suit against her employer.[15] The plaintiff in *Frampton* injured her arm while at work.[16] When she filed a worker's compensation claim, her employer terminated her.[17] The plaintiff filed suit and the Indiana Supreme Court stated: "Retaliatory discharge . . . is a wrongful, unconscionable act and should be actionable in a court of

---

8. 42 U.S.C. §§ 2000e to -e-17 (2006).

9. *See* Meyers v. Meyers, 861 N.E.2d 704, 706 (Ind. 2007); Wilson v. Chronicle Tribune, No. 27A05-0703-CV-122, 2007 WL 4107293, at *2 (Ind. Ct. App. Nov. 20, 2007).

10. *See* 12 ELIZABETH WILLIAMS, INDIANA LAW ENCYCLOPEDIA *Employment* § 31 (2006).

11. Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1120, 1128 (Ind. 2006).

12. *See, e.g.*, *Meyers*, 861 N.E.2d at 707 (declining to expand the retaliatory discharge exception to the employment-at-will doctrine); *Montgomery*, 849 N.E.2d at 1128 (refusing to broaden the exception to employment-at-will doctrine based solely on "public policy" concerns).

13. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

14. 297 N.E.2d 425 (Ind. 1973).

15. *Id.* at 428.

16. *Id.* at 426.

17. *Id.*

law."[18] Although the court acknowledged the absence of other cases holding that retaliatory discharge was actionable, the court held,

> an employee who alleges he or she was retaliatorily discharged for filing a claim pursuant to the Indiana Workmen's Compensation Act . . . has stated a claim upon which relief can be granted [and w]e further hold that such a discharge would constitute an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages.[19]

The *Frampton* court then added that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general [employment-at-will] rule must be recognized."[20]

Although the *Frampton* court's broad language implied a softening of the employment-at-will doctrine, subsequent cases illustrate that *Frampton* provides a very limited exception.[21] For example, in *Montgomery v. Board of Trustees of Purdue University*,[22] the Indiana Supreme Court declined to recognize another exception to the employment-at-will doctrine when a plaintiff was terminated allegedly due to his age.[23] The court refused to draft an age exception to the employment-at-will doctrine and emphasized that "[g]eneral expressions of public policy do not support new exceptions to the employment-at-will doctrine. Moreover, the legislative history . . . does not support Montgomery's argument."[24]

Similarly, in *Lawson v. Haven Hubbard Homes, Inc.*,[25] the Indiana Court of Appeals declined to recognize an exception to the employment-at-will doctrine when an employee was terminated for filing an unemployment compensation claim.[26] The plaintiff in *Lawson* was injured when she fell down a flight of stairs at work.[27] Although she attempted to return to work, physical restrictions from her injury made it impossible.[28] She filed an unemployment compensation claim and her employer terminated her.[29] Lawson analogized *Frampton* and claimed

---

18. *Id.* at 428.

19. *Id.*

20. *Id.*

21. *See* Meyers v. Meyers, 861 N.E.2d 704, 707 (Ind. 2007) (noting that "decisions during the [last] thirty years have made it plain that [*Frampton*] is quite a limited exception").

22. 849 N.E.2d 1120 (Ind. 2006).

23. *Id.* at 1128-31. The plaintiff in *Montgomery* was fired by Purdue University when he was fifty-seven or fifty-eight years old after he worked for the university for approximately 29 years. *Id.* at 1122. Montgomery did not have a statutorily conferred right to employment because the ICRL does not prohibit age discrimination. *Id.* at 1130.

24. *Id.* at 1128 (internal citation omitted).

25. 551 N.E.2d 855 (Ind. Ct. App. 1990).

26. *Id.* at 860.

27. *Id.* at 857.

28. *Id.*

29. *Id.*

that she was fired for exercising her statutory right to file for unemployment benefits.[30] She urged the court to expand the *Frampton* exception and apply the new version to her case.[31] However, the court distinguished *Frampton* and *McClanahan v. Remington Freight Lines*[32] and held that "fear of being discharged" would not have a "deleterious effect on the exercise of a statutory right."[33] According to the court, the employer's actions did not violate public policy.[34] Therefore, the court refused to recognize an exception to the employment-at-will doctrine.[35]

Finally, in *Morgan Drive Away, Inc. v. Brant*,[36] the Indiana Supreme Court declined to extend the *Frampton* doctrine when Brant was allegedly fired for filing a small claims action against Morgan Drive Away.[37] The court claimed that *Frampton* applied only to worker's compensation cases and subsequent courts had refused to extend *Frampton*'s scope.[38] Because employment-at-will was the state's policy, the court reasoned that any exceptions or revisions must come from the legislature, not the courts.[39] Together, *Frampton*, *Montgomery*, *Lawson*, and *Brant* indicate that in the absence of evidence of bad faith termination, in Indiana, an employee has limited recourse against his or her former employer.[40]

The only other exception to the employment-at-will doctrine that Indiana courts recognize is a narrow provision that permits an employee to sue when that employee is terminated for refusing to follow her employer's order to commit an illegal act.[41] Thus, in *McClanahan*,[42] the Indiana Supreme Court permitted a truck driver who refused to violate Illinois law by driving an overly heavy truck on the state's highways to sue his former employer.[43] The court reasoned that

---

30. *Id.* at 859.

31. *Id.*

32. 517 N.E.2d 390 (Ind. 1988).

33. *Lawson*, 551 N.E.2d at 860.

34. *Id.*

35. *Id.*

36. 489 N.E.2d 933 (Ind. 1986).

37. *Id.* at 933-34.

38. *Id.* at 934 (citing Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979) (denying claim of retaliatory discharge when employees claimed they were fired for reporting that their immediate superior had solicited and received illegal "kickbacks")); *see also* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980) (upholding trial court's determination that terminating an employee for charging his employer with violations of federal law did not fall under the *Frampton* exception because no statutory right or duty was implicated).

39. *Morgan Drive Away, Inc.*, 489 N.E.2d at 934.

40. *See* Meyers v. Meyers, 861 N.E.2d 704, 707 (Ind. 2007). The *Meyers* court emphasized that "'[r]evision or rejection of the [employment-at-will] doctrine is better left to the legislature.'" *Id.* (quoting *Morgan Drive Away, Inc.*, 489 N.E.2d at 934).

41. *See* McClanahan v. Remington Freight Lines, 517 N.E.2d 390, 393 (Ind. 1988).

42. *Id.* at 390.

43. *Id.* at 393.

refusing to allow the truck driver "any legal recourse . . . would encourage criminal conduct by both the employee and the employer."[44] However, this exception applies only when an employee is "terminated in retaliation for refusing to violate a legal obligation that carrie[s] penal consequences."[45] Because McClanahan would have been personally liable for violating Illinois law and subject to a fine, and because he would have been jointly and severally liable for any damage caused by his overweight vehicle, the Indiana Supreme Court permitted the suit.[46]

II. THE INDIANA CIVIL RIGHTS LAW

Enacted in 1971, the Indiana Civil Rights Law[47] (ICRL) makes equal opportunity employment a civil right.[48] Therefore, denying equal opportunity employment is an unlawful discriminatory practice.[49] Based on a statutory grant of authority, the ICRL[50] has the authority to investigate and, if necessary, adjudicate complaints of discriminatory behavior.[51]

A. Discrimination and the Indiana Civil Rights Law

There are two types of discriminatory behavior—disparate treatment and

---

44. *Id.*

45. *Meyers*, 861 N.E.2d at 707. *See, e.g.*, McGarrity v. Berlin Metals, Inc., 774 N.E.2d 71, 78-79 (Ind. Ct. App. 2002) (allowing a cause of action when an employee was allegedly terminated for refusing to file a false tax return); Haas Carriage, Inc. v. Berna, 651 N.E.2d 284, 288-89 (Ind. Ct. App. 1995) (stating that a claim of retaliatory discharge was cognizable when an employee was fired after refusing to haul materials in what the police considered an unsafe manner); Call v. Scott Brass, 553 N.E.2d 1225, 1229 (Ind. Ct. App. 1990) (permitting a claim of retaliatory discharge when an employee was fired for missing work to comply with a jury summons).

46. *McClanahan*, 517 N.E.2d at 393.

47. IND. CODE §§ 22-9-1-1 to -18 (2007).

48. Indiana Code section 22-9-1-2(a) states,

> It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations . . . and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

Id. § 22-9-1-2(a).

49. *See id.* § 22-9-1-2(b); *see also id.* § 22-9-1-3(*l*) (defining "Discriminatory practice"); 5 KARL OAKES, INDIANA LAW ENCYCLOPEDIA *Civil Rights* § 8 (2006). In the Indiana Law Encyclopedia, Oakes notes that "every discriminatory practice relating to employment must be considered unlawful, unless it is specifically exempted by the Indiana Civil Rights Law." *Id.*

50. IND. CODE § 22-9-1-4 (2007).

51. *Id.* § 22-9-1-6(e).

disparate impact.[52] In an employment context, disparate treatment occurs when an employer treats one individual or group of people less favorably.[53] In contrast, disparate impact occurs when a facially-neutral employment practice burdens one group more harshly than another.[54] In Indiana, disparate impact claims are actionable only if the employee is able to prove that the employer had a discriminatory motive and committed a discriminatory act.[55] For example, in *Indiana Bell Telephone Co. v. Boyd*, the court stated: "For such a claim to be cognizable . . . the motivation to so discriminate on the part of the supervisor must be shown."[56] Failure to show "intent to discriminate" renders the claim non-litigious.[57] Because it is often difficult to prove employer intent, disparate impact cases are somewhat more challenging to litigate and therefore are less common than disparate treatment claims.[58]

B. Overview of the Indiana Civil Rights Law

In *M.C. Welding & Machining Co. v. Kotwa*[59] the court summarized the procedure an individual must undertake to initiate and pursue a claim under the ICRL.[60] According to the court,

> claims arising under the Indiana Civil Rights Law . . . are presented by filing a complaint with the Indiana Civil Rights Commission, which investigates the complaint and determines if probable cause exists to believe that an illegal act of discrimination has occurred . . . . If probable cause exists, the case is heard by an administrative law judge . . . , who issues proposed findings of fact and conclusions . . . which are submitted to the ICRC . . . . The ICRC's final order is appealable to the Indiana

---

52. *See* OAKES, *supra* note 49, § 8.

53. *See* Ali v. Greater Ft. Wayne Chamber of Commerce, 505 N.E.2d 141, 143 (Ind. Ct. App. 1987). In *Ali*, the court stated that disparate treatment "occurs when an employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. When this type of treatment is alleged, this Court has held that the motive behind it is highly significant and dispositive." *Id.* (citing Ind. Civil Rights Comm'n v. City of Muncie, 459 N.E.2d 411, 418 (Ind. Ct. App. 1984)).

54. *See* Ind. Bell Tel. Co. v. Boyd, 421 N.E.2d 660, 666 (Ind. Ct. App. 1981) (defining disparate impact discrimination as facially neutral employment practices "that in fact fall more harshly on one group than another and cannot be justified by business necessity").

55. *See id.* at 666-67.

56. *Id.* at 667.

57. *Id.*

58. *See* 14A C.J.S. *Civil Rights* § 239 (2006) (discussing the requirement that individuals demonstrate more than the fact that the employer's practice has a negative effect on the plaintiff because to prove adverse impact the plaintiff must show that the policy at issue was adopted because of its adverse effect on an individual or group); OAKES, *supra* note 49, § 8 (noting that proof of discriminatory motive is crucial).

59. 845 N.E.2d 188 (Ind. Ct. App. 2006).

60. *Id.* at 192 n.3.

Court of Appeals.[61]

Therefore, if an employee suffers discrimination through either disparate treatment or disparate impact and chooses to file a complaint, the ICRC is obligated to investigate.[62]

In order to conduct its investigation, the ICRC is expressly authorized to hold hearings, subpoena witnesses, and take testimony under oath.[63] If, after thorough investigation and an administrative hearing, the ICRC is convinced that an unlawful discriminatory practice occurred, the ICRC may order the violator to cease and desist from the unlawful discriminatory practice.[64] The ICRC may also require further action:

> (A) to restore [the employee's] losses incurred as a result of discriminatory treatment . . . ; however, this specific provision when applied to orders pertaining to employment shall include only wages, salary, or commissions;
> (B) to require the posting of notice setting forth the public policy of Indiana concerning civil rights and respondent's compliance with the policy in places of public accommodations;
> (C) to require proof of compliance to be filed by respondent at periodic intervals; and
> (D) to require a person who has been found to be in violation of this chapter and who is licensed by a state agency authorized to grant a license to show cause to the licensing agency why his license should not be revoked or suspended.[65]

Thus, when an employee alleges discriminatory treatment, the default remedy is an administrative proceeding conducted by the ICRC,[66] which means that the employee can receive the types of relief listed in section 22-9-1-6(k) of the Indiana Code.[67]

However, a subsequent provision of the Indiana Code allows a civil action

---

61. *Id.*

62. IND. CODE § 22-9-1-6(e) (2007) ("The commission *shall* receive and investigate complaints alleging discriminatory practices . . . . All investigations of complaints shall be conducted by staff members of the civil rights commission or their agents." (emphasis added)).

63. *Id.* § 22-9-1-6(i).

64. *Id.* § 22-9-1-6(k).

65. *Id.* § 22-9-1-6(k)(A)-(D).

66. *Id.* § 22-9-1-18(a). The ICRL also provides an option for judicial review. Section 22-9-1-6(*l*) states, "Judicial review of a cease and desist order or other affirmative action as referred to in this chapter may be obtained." However, review must be sought within thirty days of the ICRC's decision. *Id.* § 22-9-1-6(*l*). Furthermore, the ICRL permits consent decrees and when signed by the parties and a majority of the commissioners, the consent decree has the same effect as a cease and desist order. *Id.* § 22-9-1-6(p).

67. *Id.* § 22-9-1-6(k).

instead of an administrative proceeding.[68] According to this provision, the case can be decided by a civil action if both the complainant and the respondent consent in writing.[69] But the ICRL explicitly states that the "election [of a civil action] may not be made if the commission has begun a hearing on the record . . . with regard to a finding of probable cause."[70] Therefore, individuals who are unaware of the civil litigation option may begin pursing their administrative remedy. They will be precluded from seeking judicial relief if they subsequently change their minds and desire a civil trial.[71] Nevertheless, if both parties agree to forgo the administrative proceeding and rely on civil adjudication, section 22-9-1-17 governs and the complainant may file a civil action,[72] which will be tried by the court, "without benefit of a jury."[73] Thus, unless the complainant convinces the defendant to consent to civil litigation, the case proceeds through the administrative hearing process and is decided by an administrative law judge.

C. Shortcomings of Indiana's Statutory Procedure

Indiana's default for administrative procedures in lieu of civil adjudication is by no means exceptional.[74] However, the state's procedure appears biased against employees who want to litigate employment discrimination cases against their employers.

1. Unpublished Decisions.—By making administrative proceedings the default remedy, many employment discrimination decisions go unpublished. The only readily available decisions are those on which the Indiana Court of Appeals has ruled. This benefits employers because the administrative proceeding does not involve a public judgment that "might more easily lend itself to being used against the employer in future claims by other employees."[75]

Furthermore, when employment discrimination decisions go unpublished, the courts and the State miss an opportunity to develop Indiana's civil rights law. One author emphasizes this point stating, "The development of civil rights law depends in part on the public resolution of disputes."[76] Johnson claims that

---

68. *Id.* § 22-9-1-16(a).

69. *Id.*

70. *Id.* § 22-9-1-16(b).

71. *See id.*

72. *Id.* § 22-9-1-16(a).

73. *Id.* § 22-9-1-17(c).

74. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 5/7A-102 (West 2001 & Supp. 2008); KY. REV. STAT. ANN. § 344.210 (West 2006); OHIO REV. CODE ANN. § 4112.05(D) (West 2007 & Supp. 2008).

75. David B. Tukel, *To Arbitrate or Not to Arbitrate Discrimination Claims: That is Now the Question for Michigan Employers*, 79 MICH. B.J. 1206, 1207 (2000). Tukel also notes that employers generally prefer proceedings that are "faster, less formal, and less costly," which explains why arbitration has become so popular. *Id.*

76. Nicholas S. Johnson, Note, *Arbitration of Employer Violations of the West Virginia Human Rights Act: West Virginia Should Make Like Ants Marching and Continue Its Pursuit of*

published decisions serve two major functions in the development of the law:

> First, public resolution will specifically deter the individual employer-defendant because there is an incentive for an employer to maintain a favorable reputation. Second, public knowledge of a civil rights resolution will generally deter all employers from engaging in discriminatory actions in order to avoid being in disputes in the future.[77]

Although Johnson discusses unpublished decisions in the context of arbitration agreements, his reasoning and conclusion are also relevant in this context.

2. *Unavailability of Jury Trial.*—Although the ICRL provides individuals an opportunity to obtain a civil hearing, section 22-9-1-17(c) makes it clear that this hearing does not occur in front of a jury.[78] Instead, the statute provides for a judicial bench trial.[79] This too benefits the employer because it provides a more private forum for adjudication. Indeed, Tukel notes that many employers prefer private proceedings, conducted by experts, to full-scale jury trials.[80] This preference is based on the belief that avoiding a jury trial reduces damage awards.[81] However, an interesting article by David Benjamin Oppenheimer challenges the basis of this belief.[82]

Oppenheimer reviewed data from California employment law cases.[83] He determined that although juries found for plaintiffs 53% of the time,[84] when cases were separated into common law discharge cases and statutory employment

---

Bliss, 108 W. VA. L. REV. 205, 216 (2005).

77. *Id.* (footnotes omitted).

78. IND. CODE § 22-9-1-17(c) (2007) (stating that "[a] civil action filed under this section must be tried by the court without benefit of a jury.").

79. *Id.*

80. *See* Tukel, *supra* note 75, at 1207. Tukel notes that

> [a]nother potential advantage of arbitration is that an arbitrator, who generally has experience in workplace disputes, will decide the issue rather than a jury that might be more influenced by sympathies than by legal arguments or evidence. In addition, arbitration offers a private setting, which may reduce concerns about pursuing, or defending against, sensitive claims such as those involving sexual harassment.

81. Jury trials allegedly yield higher settlements than either administrative proceedings or alternative dispute resolutions. *Development in the Law, Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1517 (1987). This article asserts that the traditional reliance on the jury has been eroded and critics of the current system often argue that jurors are biased against wealthy or institutional defendants, possess an impulse to redistribute wealth, are incompetent or unable to comprehend the complexities of fixing the amount of a damage award, and are susceptible to influence so that they institute large damage awards. *Id.* at 1513-14.

82. *See generally* David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003).

83. *Id.* at 514.

84. *Id.* at 516.

discrimination cases, the success rates varied.[85] Plaintiffs were less likely to prevail in statutory employment discrimination cases than they were in common law discharge cases.[86] When the statutory discrimination cases were further examined, Oppenheimer found that plaintiffs won 42.6% of the time when the case went before a jury.[87] However, when the case was decided in a bench trial, plaintiffs won only 22.2% of the time.[88] Another study cited by Oppenheimer and performed by the U.S. Department of Justice reports similar figures.[89] From a compilation of his most recent data, Oppenheimer concludes that there is a significant difference between jury trial and bench trial outcomes.[90] "Plaintiffs won 35% of the jury trials, but only 23% of the bench trials, with median awards in jury trials over twice the median awards in bench trials."[91] He claims that the only logical conclusion is that bias plays a major role in employment discrimination cases.[92] However, plaintiffs' low success rates before both judges and juries indicate that contrary to popular belief, juries are not "'far more sympathetic to plaintiffs than to defendants in employment discrimination cases.'"[93] Therefore, altering Indiana's law[94] to permit jury trials would not necessarily adversely impact employers.

Furthermore, jury trials are beneficial because they help the plaintiff "fully vindicate [his or] her rights and make strides in ensuring that . . . other employers . . . will not repeat the offenses."[95] Thus, despite the fact that a jury trial may be uncomfortable for the employee because his private affairs become public knowledge, allowing him access to the courts ensures full adjudication and vindication.[96]

3. Damage Limitations.—Perhaps the most alarming effect of the ICRL is that in employment discrimination cases, damages are limited to "wages, salary, or commissions."[97] Even though the ICRL appears to permit damage awards

---

85. *Id.*

86. *Id.* Oppenheimer's results indicate that plaintiffs succeed in 59% of common law discharge cases but only 50% of employment discrimination cases. *Id.*

87. *Id.* at 522 (citing Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1582 (1989)).

88. *Id.* (citing Eisenberg, *supra* note 87, at 1582).

89. *Id.* at 523 (citing Civil Trials and Verdicts in Large Countries, 1996, Bureau of Justice Statistics Special Report NCJ 173426 (1999), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc96.htm).

90. *Id.*

91. *Id.*

92. *Id.* at 553 (quoting Charles F. Thompson, Jr., *Juries Will Decide More Discrimination Cases: An Examination of* Reeves v. Sanderson Plumbing Products, Inc., 26 VT. L. REV. 1, 1-2 (2001)).

93. *Id.* (quoting Thompson, *supra* note 92, at 1-2).

94. *See* IND. CODE § 22-9-1-17 (2007).

95. Johnson, *supra*, note 76, at 218.

96. *See id.* at 230.

97. IND. CODE § 22-9-1-6(k)(A) (2007).

necessary to redress the plaintiff's "losses incurred as a result of discriminatory treatment,"[98] this language is not as inclusive as it seems.

Although the ICRL provides other remedies such as posting notice of Indiana's civil rights law, requiring proof of compliance with the law, and requiring a state-licensed violator to show cause why his or her license should not be revoked or suspended, none of these remedies directly compensate the injured plaintiff.[99] Furthermore, the ICRL does not provide for damages due to pain and suffering, mental anguish, or emotional distress, nor does it allow for punitive damages or account for economic non-wage losses.[100] The Indiana Court of Appeals emphasized this point in *Indiana Civil Rights Commission v. Union Township Trustee*,[101] when the court plainly stated that "'[c]ompensatory and punitive damages are *not* available under the Indiana Civil Rights Act.'"[102] As a result, the ICRL damage limitations benefit employer-defendants and adversely impact employee-plaintiffs.

4. Attorney's Fees.—Finally, the ICRL does not allow the prevailing party to recover his or her attorney's fees.[103] Indeed, in a strongly-worded footnote the

---

98. *Id.*

99. *See id.* § 22-9-1-6(k) (discussing the various types of relief available to compensate an injured plaintiff). Section 22-9-1-6(k)(A) provides for damages, which in employment cases, are limited to "wages, salary, or commissions." *Id.* § 22-9-1-6(k)(A). Section 22-9-1-6(k)(B) requires "the posting of notice setting forth the public policy of Indiana concerning civil rights and respondent's compliance with the policy in places of public accommodations." *Id.* § 22-9-1-6(k)(B). Section 22-9-1-6(k)(C) requires that the defendant file periodic reports of compliance, and section 22-9-1-6(k)(D) permits the ICRC to suspend or revoke the license of an entity licensed by the State. *Id.* § 22-9-1-6(k)(C)-(D).

100. *See id.* § 22-9-1-6(k)(B) (limiting the damages available in employment cases to "include only wages, salary, or commissions" and making no provision for pain and suffering, mental anguish, emotional distress, or punitive damages). Additionally, the statute makes no mention of economic non-wage losses; however, the language of section 22-9-1-6(k) seems to expressly bar compensation for such losses by limiting damages to "wages, salary, or commissions." *Id.*; *see also* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (holding that emotional distress and punitive damages are not available under the ICRL), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

101. 590 N.E.2d 1119 (Ind. Ct. App. 1992).

102. *Id.* at 1121 (quoting Fields v. Cummins Employees' Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) (emphasis added)); *accord* Ind. Civil Rights Comm'n v. Midwest Steel, 450 N.E.2d 130, 140 (Ind. Ct. App. 1983) ("The purpose of the limitation that 'orders pertaining to employment shall include only wages, salary or commissions,' is to prohibit an award of monetary damages for feelings of embarrassment or insult which may arise out of discriminatory acts . . . .").

103. Interestingly, the ICRL at one point permitted an award of attorney's fees to the prevailing party. IND. CODE § 22-9-1-14 (repealed 1995). However, this provision was short-lived and existed in the Indiana Code only from July 1994 to December 1995. *Id.*; *see* IND. CODE § 22-9.5-7-2 (2007) (fee-shifting provision in housing discrimination cases has not been extended to employment discrimination cases); *Adler*, 689 N.E.2d at 1279 (noting that the legislature has

Adler court criticized the ICRC for its "continued expenditure of public funds to . . . relitigate an established rule of law."[104] The court emphasized that the ICRC should lobby the legislature to change the law to avoid continued disregard of legal precedent.[105] Furthermore, as the *Adler* court noted, a fee-shifting provision has been proposed by the legislature but has never been adopted.[106] The absence of fee-shifting legislation may discourage litigation and detrimentally affect injured plaintiffs.[107] By refusing to permit fee-shifting the ICRL may also have the unintended consequence of inducing less-vigorous defenses as employers may gamble that an employee's administrative award will be less costly than defending the suit at trial.[108]

III. FEDERAL LAW: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Based on the limitations of the ICRL, many individuals who have experienced discriminatory treatment in the course of their employment invoke Title VII[109] and elect to litigate in federal court. Unfortunately, Title VII does not provide an adequate remedy for many plaintiffs.

A. Background

Title VII makes it illegal for an employer to discriminate against an individual based on "race, color, religion, sex, or national origin."[110] In 1991, Congress found that "additional remedies under [f]ederal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . . and . . . legislation is necessary to provide additional protections against unlawful discrimination in employment," and amended Title VII.[111] The purpose of this legislation was to

---

proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted).

104. *Adler*, 689 N.E.2d at 1279 n.3.

105. *Id.*

106. *Id.* at 1279 (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted).

107. *See* 1 ROBERT L. ROSSI, ATTORNEYS' FEES *Recovery of Attorneys' Fees by Plaintiff* § 10:20 (3d ed. 2008) (noting that "it is well-settled that a plaintiff who prevails in a civil rights action should ordinarily recover reasonable attorney's fees"). Rossi claims that attorneys' fee awards are necessary because they encourage individuals to "act as private attorneys" and vigorously litigate and defend their civil rights. *Id.* Thus, it would be reasonable to presume that failing to award attorneys' fees would chill civil rights litigation.

108. *See* Tukel, *supra* note 75, at 1207 (emphasizing that arbitration, an out-of-court proceeding, is favored by employers because it is faster, less expensive, and often produces smaller awards than those in civil litigation). Tukel's point as to arbitration versus civil litigation can be generalized to the choice between administrative proceedings and civil litigation as well.

109. 42 U.S.C. § 2000e to -e-17 (2006).

110. *Id.* § 2000e-2(a)(1).

111. Civil Rights Act of 1991, S. 1745, 102d Cong. § 2, 105 Stat. 1071 (1991).

> (1) provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . .
>
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e [to e-17]); and
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.[112]

The amendments, codified in § 1981(a),[113] purported to expand damage provisions and increase the availability of jury trials.[114] Thus, as amended, Title VII allows either party to demand a jury trial whenever compensatory or punitive damages are sought.[115] Unfortunately, although the impetus underlying the amendment of Title VII was benign, in practice and effect, the 1991 amendments limited employees' ability to receive full compensation for injuries suffered due to intentional discrimination.

B. Damage Limitations

Although Title VII, as amended, permits plaintiffs to recover damages for harm suffered due to employment discrimination,[116] Jarod Gonzales notes,

---

112. *Id.*

113. 42 U.S.C. § 1981a (2006).

114. *See id.* § 1981a(c). Specifically, the statute allows a party alleging unlawful intentional discrimination against an employer, and who cannot recover under 42 U.S.C. § 1981, to recover compensatory and punitive damages as provided by subsection (b) of the statute, as well as any relief authorized by section 706(g) of the Civil Rights Act of 1964. *Id.* § 1981a(a)(1). Section (b) of the statute provides that the

> complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id. § 1981a(b)(1). However, the damages awarded do not include "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." *Id.* § 1981a(b)(2). Part (b)(3) goes on to limit compensatory damages to "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses" based on the size of the employer (i.e. the number of employees). *Id.* § 1981a(b)(3).

115. *Id.* § 1981a(c).

116. *Id.* § 1981a(a)(1); *see also* Jarod S. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116 (2007).

> Title VII of the Civil Rights Act of 1964 (Title VII) . . . places a cap on the amount of compensatory damages—emotional pain, suffering, and mental anguish—and punitive damages recoverable against an employer, under federal law, for any type of employment discrimination. At most, the aggrieved employee may recover a total of $300,000 for compensatory and punitive damages . . . . [However, e]ach individual state can choose to make discrimination in employment, based on whatever prohibited factors it so desires, a violation of state law and may provide a greater *or lesser* remedy for such a violation than federal law provides.[117]

As a result, in states that provide less compensation for employment discrimination than Title VII, plaintiffs will attempt to recover under Title VII. Unfortunately, as noted by Gonzales,[118] and emphasized by the U.S. Supreme Court in *Albemarle Paper Co. v. Moody*,[119] although "the purpose of Title VII [is] to make persons whole for injuries suffered on account of unlawful employment discrimination,"[120] Title VII has historically been interpreted as a prophylactic statute aimed at preventing discrimination.[121] Thus, the statute's damage provisions are limited and may not adequately compensate plaintiffs who have suffered extreme or egregious discrimination.

C. Limiting the Scope of Title VII

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees."[122] However, Title VII carves out exceptions to the definition of employer that limit the statute's scope. According to these exceptions, the "term does not include (1) the United States . . . or (2) a bona fide private membership club (other than a labor organization) . . . [and] persons having fewer than twenty-five employees (and their agents) shall not be considered employers."[123] Through its limited definition of "employer," Title VII effectively exempts numerous groups, including the government. Accordingly, employees of exempt organizations are unable to utilize Title VII and must instead rely on state statutory or common law to recover compensation for discrimination.

IV. CIVIL RIGHTS CASES IN OTHER JURISDICTIONS

To gauge how different Indiana's civil right's law is from other jurisdictions one must compare Indiana to surrounding states. This comparison also facilitates

---

117. Gonzalez, *supra* note 116, at 116 (emphasis added).
118. *Id.*
119. 422 U.S. 405 (1975).
120. *Id.* at 418.
121. *Id.* at 417 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).
122. 42 U.S.C. § 2000e(b) (2006).
123. *Id.*

revision of the Indiana statute because it illuminates provisions from other areas that have proven efficient and effective. In analyzing analogous statutes from Ohio, Illinois, Kentucky, and Michigan, Indiana lawmakers may gain a clear idea of where to begin when, or if, revision of the Indiana Code is undertaken.

A. Ohio

The Ohio Civil Rights Code sounds similar to the Indiana Code with respect to employment discrimination.[124] Ohio's default procedure is to resolve employment discrimination cases through an administrative proceeding.[125] After receiving notice of the charges of discriminatory conduct, the Ohio Civil Rights Commission (Commission) will attempt to resolve the issue through informal proceedings.[126] If the issue cannot be resolved informally, then the Commission "may initiate a preliminary investigation to determine whether it is probable that an unlawful discriminatory practice has been or is being engaged in."[127] After the investigation, if the Commission believes that unlawful discrimination has occurred, the Commission will again attempt to informally induce compliance.[128] However, if the Commission is unable to eliminate the discrimination, then it serves the offender with a complaint, which states the charges and provides notice of the Commission hearing.[129] An administrative hearing is conducted and if the Commission finds that the defendant engaged in discriminatory behavior, then the defendant is ordered to cease and desist.[130] The Commission may also pursue "any further affirmative or other action that will effectuate the purposes of this chapter."[131] Thus, Ohio's basic administrative procedure appears analogous to Indiana's procedure.

However, there is a major difference between the Ohio and Indiana civil rights statutes. Ohio Code section 4112.99[132] states, "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or *any other*

---

124. *See* OHIO REV. CODE ANN. § 4112.02 (West 2007 & Supp. 2008) (noting what constitutes prohibited discriminatory conduct in Ohio).

125. *See id.* § 4112.05(A) ("The *commission* . . . shall prevent any person from engaging in unlawful discriminatory practices, provided that, before instituting the formal hearing . . . [the commission] shall attempt, by informal methods of conference, conciliation, and persuasion, to induce compliance with this chapter.") (emphasis added).

126. *Id.* § 4112.05(A).

127. *Id.* § 4112.05(B)(2).

128. *Id.* § 4112.05(B)(4).

129. *Id.* § 4112.05(B)(5).

130. *Id.* § 4112.05(G)(1).

131. *Id.* Remedies listed in this portion of the statute include, but are not limited to, "hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, and requiring the respondent to report to the commission the manner of compliance." *Id.*

132. *Id.* § 4112.99 (West 2008).

appropriate relief."[133] This portion of the Ohio Code expressly permits civil litigation and also allows additional remedies, including front pay and punitive damages.[134] Quite significantly, unlike the Indiana statute, which contains a caveat limiting civil suits and is silent regarding punitive damages, the Ohio Code does not limit civil suits and expressly authorizes punitive damages.[135]

The cases interpreting section 4112.99 indicate that Ohio courts have faithfully applied the statute's mandate. For example, the court in *Elek v. Huntington National Bank*[136] recognized that a handicapped individual who was discriminatorily discharged by his employer could demand a civil trial to compensate for his injury.[137] The Ohio Supreme Court rejected the defendant's argument that section 4112.99 grants a jury trial only in specific circumstances, such as when a plaintiff suffers age, credit, or housing discrimination.[138] The *Elek* court relied on the "clear and unambiguous language of the statute"[139] and the fact that the statute "specifically states that the civil action is available to remedy any violation of [the civil rights code]."[140] Thus, the court held that the Ohio legislature did not intend to limit the availability of the civil action.[141] "Had the General Assembly meant to limit the availability of the civil action remedy . . . [the legislature] would have identified the section to which [section 4112.99] applied. . . ."[142] Because the legislature left the statute unbounded, "its language applies to any form of discrimination addressed [by the rest of the civil rights code]."[143] Although the court acknowledged that interpreting section 4112.99 to permit civil litigation in all situations may be redundant in some situations, "such a result is not fatal."[144] Finally, the court emphasized that section 4112.99 is a remedial statute and should "be liberally construed to promote its object (elimination of discrimination) and protect those to whom it is addressed (victims of discrimination)."[145]

However, even post-*Elek*, section 4112.99 does not apply when the

---

133. *Id.* (emphasis added).

134. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999) (allowing punitive damages in cases brought under section 4112.99 as long as actual malice was shown); Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 517 (Ohio Ct. App. 1995) (noting that front pay is permitted in cases involving race, age, sex, and handicap discrimination).

135. *Compare* IND. CODE §§ 22-9-1-16 to -17 (2007); *with* OHIO REV. CODE ANN. § 4112.99 (West 2008), *and Rice*, 704 N.E.2d at 1221 (permitting punitive damages).

136. 573 N.E.2d 1056 (Ohio 1991).

137. *Id.* at 1059.

138. *Id.* at 1057-58.

139. *Id.* at 1058.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

complainant first files suit with the Ohio Civil Rights Commission.[146] Nevertheless, Ohio courts continue to give the statute broad effect and in *Kramer v. Windsor Park Nursing Home, Inc.*,[147] the court held that section 4112.99 creates a private right of action distinct from the other remedies available under the civil rights law.[148] Thus, the court extended the statute's breadth.

Section 4112.99 has also increased the types of remedies available to plaintiffs suing under Ohio's civil rights law. The provision has been interpreted to allow front pay as a remedy[149] and to permit punitive damage awards as long as actual malice can be shown.[150] In *Berge v. Columbus Community Cable Access*,[151] the court stated, "Punitive damages may be awarded in actions brought pursuant to [section 4112.99]"[152] as long as actual malice is shown.[153] According to the Ohio Supreme Court, actual malice is "'(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.'"[154] Furthermore, in *Sutherland v. Nationwide General Insurance Co.*,[155] the court indicated that even though the language of section 4112.99 does not expressly authorize a party to recover attorneys' fees, they are available in some cases.[156] For example, when the opposing party acted "in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons,"[157] or when punitive damages are warranted, then attorneys' fees are recoverable "even in the absence of statutory authorization."[158] Thus, in cases brought under section 4112.99 in which the court awards punitive damages, attorneys' fees are also recoverable.

A subsequent case, *Rice v. CertainTeed Corp.*,[159] reiterated Ohio's commitment to providing punitive damages to victims of employment

---

146. *See* Kocak v. Cmty. Health Partners of Ohio, Inc., 400 F.3d 466, 472 (6th Cir. 2005) (filing suit with the Ohio Civil Rights Commission "generally precludes a subsequent suit under section 4112.99").

147. 943 F. Supp. 844 (S.D. Ohio 1996).

148. *Id.* at 856 (citing *Elek*, 573 N.E.2d at 1057). In *Elek*, the court noted that "plain reading of this section yields the unmistakable conclusion that a civil action is available to remedy any form of discrimination identified in [the Ohio Civil Rights Code]." *Elek*, 573 N.E.2d at 1057.

149. Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 517 (Ohio Ct. App. 1995) (permitting front pay in cases involving race, age, sex, and handicap discrimination).

150. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999); Berge v. Columbus Cmty. Cable Access, 736 N.E.2d 517, 540-42 (Ohio Ct. App. 1999).

151. 736 N.E.2d 517 (Ohio Ct. App. 1999).

152. *Id.* at 540.

153. *Id.* at 542.

154. *Id.* (quoting Preston v. Murty, 512 N.E.2d 1174, 1176 (Ohio 1987)).

155. 657 N.E.2d 281 (Ohio Ct. App. 1995).

156. *Id.* at 283.

157. *Id.*

158. *Id.*

159. 704 N.E.2d 1217 (Ohio 1999).

discrimination. The *Rice* court emphasized that the Ohio civil rights statute should be broadly construed.[160] Therefore, it was reasonable to interpret the statute as permitting punitive damage awards.[161] The court went on to state that interpreting the statute as "also possess[ing] a deterrent component . . . [will not] render the statute penal in nature . . . . '[A] law is not penal merely because it imposes an extraordinary liability on a wrongdoer in favor of a person wronged, which is not limited to damages suffered by him.'"[162] Thus, the court held that "[h]aving a primary remedial purpose . . . does not constrain [the civil rights code's] deterrent aim . . . . [C]onstruing the word 'damages' as including only those damages that are compensatory would be inconsistent not only with the definition of the word but also with the purpose and intent of [section 4112.99]."[163] In contrast, Indiana does not permit punitive damages.[164] Thus, section 4112.99, which permits civil suits and provides a broader variety of remedies, makes Ohio's civil rights code seem less employer-centric than Indiana's.[165]

B. Illinois

As in other states, Illinois's civil rights statute bans discriminatory conduct in employment.[166] The Illinois Code divides the procedural portion of its civil rights statute into two sections. Article 7A addresses the majority of civil rights violations[167] and Article 7B is narrowly tailored to address housing discrimination.[168] Under Article 7A, after receiving a report from the employee alleging employment discrimination, the Illinois Department of Human Rights conducts an investigation.[169] If the department is convinced that the Illinois Code was violated, the department "notif[ies] the parties that the complainant [employee] has the right to either commence a civil action . . . or request that the Department of Human Rights file a complaint with the Human Rights

---

160. *Id.* at 1220.

161. *Id.* at 1220-21.

162. *Id.* (quoting Cosgrove v. Williamsburg of Cincinnati Mgmt. Co., 638 N.E.2d 991, 997 (Ohio 1994) (Resnick, J., concurring)).

163. *Id.*

164. *See* Ind. Civil Rights Comm'n v. Union Twp. Tr., 590 N.E.2d 1119, 1121 (Ind. Ct. App. 1992) (quoting Fields v. Cummins Employees' Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) for the proposition that "[c]ompensatory and punitive damages are not available under the Indiana Civil Rights Act").

165. *See* IND. CODE §§ 22-9-1-6(k), 22-9-1-16 (2007).

166. 775 ILL. COMP. STAT. ANN. 5/2-102(A) (West 2001 & Supp. 2008).

167. *See* 775 ILL. COMP. STAT. ANN. 5/7A-101 (West 2001) (indicating that the procedures of article 7A apply to discrimination in employment, education, public accommodations, and financial transactions).

168. *See id.* 5/7B-101 (stating that Article 7B applies only to housing discrimination cases).

169. *See* 775 ILL. COMP. STAT. ANN. 5/7A-102(C)(1) (West 2001 & Supp. 2008).

Commission."[170] The department also permits informal conciliation in lieu of an administrative or civil hearing.[171] However, if the complainant elects to pursue his administrative remedy then a formal administrative hearing is held before the Illinois Human Rights Commission (IHRC).[172] If the employee prevails before the IHRC then he is entitled to a variety of remedies,[173] which are not substantially different from the administrative remedies available in Indiana.[174] Additionally, the Illinois statute includes a remedy that is not available to an Indiana employee who pursues an administrative remedy—payment of attorney's fees.[175] Thus, unlike the Indiana civil rights statute, the Illinois statute explicitly provides for attorney's fees.[176]

Illinois courts have upheld ALJ-awarded attorneys' fees in employment discrimination cases. For example, in *Raintree Health Care Center v. Illinois Human Rights Commission* (*Raintree II*),[177] the court invoked the Illinois civil rights act and stated that "upon a finding of a civil rights violation, an ALJ may recommend and the [IHRC] may require that reasonable attorney fees be paid to the complainant for the cost of maintaining the action."[178] The court emphasized the discretionary nature of attorney's fee awards under the statute and gave the ALJ's determination a great deal of deference, stating, "As long as the ALJ is able to determine what amount would be a reasonable award of attorney fees . . . such a determination should not be disturbed on review."[179] Despite the discretionary nature of the award, Illinois courts require that demands for attorney's fees be reasonable.[180] But as long as the employee is able to prove that

---

170. *Id.* 5/7A-102(D)(4) (West Supp. 2008).

171. *Id.* 5/7A-102(E).

172. *See id.* 5/8A-102(G).

173. *See id.* 5/8A-104 (West 2001). Remedies include: issuance of a cease and desist order, payment of actual damages, reinstatement, reporting compliance, and posting notices of compliance. *Id.*

174. *See* IND. CODE § 22-9-1-6(k) (2007) (listing available remedies).

175. *See* 775 ILL. COMP. STAT. ANN. 5/8A-104(G) (West 2001) (expressly permitting that payment "to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees incurred in maintaining this action . . . and in any judicial review and judicial enforcement proceedings").

176. *Compare id.* 5/8A-104, *with* IND. CODE § 22-9.5-7-2 (2007) (noting the fee-shifting provision in housing discrimination cases that has not been extended to employment discrimination cases), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

177. 672 N.E.2d 1136 (Ill. 1996).

178. *Id.* at 1147.

179. *Id.* at 1148.

180. Raintree Health Care Ctr. v. Ill. Human Rights Comm'n (*Raintree I*), 655 N.E.2d 944, 951 (Ill. App. Ct. 1995) ("[O]nly those attorney fees which are reasonable will be allowed, and the party requesting fees bears the burden of presenting sufficient evidence from which the trier of fact

she won a substantial portion of her case she is entitled to recover her attorney's fees in order to encourage similarly-situated plaintiffs to litigate their interests.[181]

A second difference between the Illinois Code and the Indiana Code is that the Illinois Civil Rights Act contains broad language that allows an injured plaintiff to recover more extensive damages[182] than are available in Indiana.[183] This makes the Illinois Civil Rights Act appear more employee-friendly. For example, in *Charles A. Stevens & Co. v. Human Rights Commission*,[184] the court upheld the IHRC's front pay award.[185]

Furthermore, in *ISS International Services Systems, Inc. v. Illinois Human Rights Commission*,[186] the court held that "[a]ctual damages include compensation for emotional harm and mental suffering."[187] Finally, in *Page v. City of Chicago*,[188] the court broadened the scope of the Illinois statute when it determined that the Illinois Human Rights Act does not prevent regulation of an employer with fewer than fifteen employees.[189] With respect to punitive damages, the *Page* court went on to note that the Act may be interpreted to allow provision of punitive damages where it is "highly appropriate and necessary."[190]

Thus, Illinois's civil rights law, which provides more extensive damage awards and allows the prevailing party to recoup his or her attorney's fees, is more similar to Kentucky's civil rights code than it is to Indiana's.[191]

---

can render a decision as to their reasonableness.").

181. Brewington v. Dep't of Corr., 513 N.E.2d 1056, 1064-65 (Ill. App. Ct. 1987).

182. *See* ILL. COMP. STAT. ANN. 5/8A-104(J) (West 2001) (allowing "such action as may be necessary to make the individual complainant whole, including, but not limited to, awards of interest on the complainant's actual damages and backpay from the date of the civil rights violation").

183. *Compare id.*, *with* IND. CODE § 22-9-1-6(k)(A) (2007).

184. 554 N.E.2d 976 (Ill. App. Ct. 1990).

185. *Id.* at 981 ("[T]he Illinois Human Rights Act provides . . . that the Commission may provide for any relief to 'make the individual complainant whole.' Front pay is a remedy available to compensate an individual who had been wronged by an employer's violation. . . . Front pay may be appropriate, especially when the plaintiff has no reasonable prospect of obtaining comparable employment.") (citations omitted).

186. 651 N.E.2d 592 (Ill. App. Ct. 1995).

187. *Id.* at 598 (citing Vill. of Bellwood Bd. of Fire & Police Comm'rs v. Human Rights Comm'n, 541 N.E.2d 1248, 1258 (1989)).

188. 701 N.E.2d 218 (Ill. App. Ct. 1998).

189. *Id.* at 226.

190. *Id.* at 228.

191. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001), *and* KY. REV. STAT. ANN. § 344.450 (West 2006), *with* IND. CODE § 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

C. Kentucky

Much of Kentucky's civil rights statute is similar to Indiana's. Indeed, like Indiana, the Kentucky Code even contains a provision that prevents discrimination based on use of tobacco products.[192] As is common in civil rights statutes, Kentucky's default procedure is an administrative hearing conducted by the Kentucky Commission on Human Rights (KCHR).[193] As in other jurisdictions,[194] prior to conducting a formal administrative hearing, the KCHR usually attempts to resolve the discriminatory practice through mediation or conciliation.[195] However, conciliation is neither mandatory nor guaranteed and informal resolution can halt at any time.[196]

If conciliation is unsuccessful the case moves through administrative proceedings.[197] If the KCHR determines that discrimination has occurred, it is entitled to "take affirmative action [to remedy the discrimination]."[198] The Kentucky statute lists the available remedies,[199] and they are not significantly different from the administrative remedies available in Indiana.[200]

However, unlike Indiana, the Kentucky Code indicates that administrative damages may include "compensation for humiliation and embarrassment, and . . . for other costs actually incurred by the complainant as a direct result of an unlawful practice."[201] This portion of the Kentucky Code withstood

---

192. *Compare* IND. CODE § 22-5-4-1 (2007), *with* KY. REV. STAT. ANN. § 344.040(1) (West 2006). The comparable Indiana Code provision is codified in section 22-5-4-1 and states that an employer may not

> (1) require, as a condition of employment, an employee or prospective employee to refrain from using; or
>
> (2) discriminate against an employee with respect to:
>
> (A) the employee's compensation and benefits; or
>
> (B) terms and conditions of employment;
>
> based on the employee's use of;
>
> tobacco products outside the course of the employee's or prospective employee's employment.

IND. CODE § 22-5-4-1(a) (2007). However, section 22-5-4-1(b) does permit employers to provide financial incentives "intended to reduce tobacco use." *Id.* § 22-5-4-1(b). Indiana employers who violate section 22-5-4-1 are amenable to civil litigation. *Id.* § 22-5-4-2.

193. KY. REV. STAT. ANN. § 344.210(4) (West 2006).

194. *See, e.g.*, OHIO REV. CODE ANN. § 4112.05(B)(4) (West 2007 & Supp. 2008).

195. KY. REV. STAT. ANN. § 344.200(4) (West 2006).

196. *See id.* § 344.200(4)-(6).

197. *Id.* § 344.210(1).

198. *Id.* § 344.230(2).

199. *See id.* § 344.230(3) (listing the available remedies which include reinstatement, posting notices, reporting compliance to the Commission, and paying the plaintiff damages resulting from the unlawful practice).

200. *See* IND. CODE § 22-9-1-6(k) (2007).

201. KY. REV. STAT. ANN. § 344.230(3)(h) (West 2006). *Contra* IND. CODE § 22-9-1-6(k)(A)

constitutional challenge in *Kentucky Commission on Human Rights v. Fraser*.[202] In *Fraser*, the court held that there was "nothing unconstitutional in the administrative award of damages under [section 344.230(3)] where due process procedural rights have been protected, where prohibited conduct has been well defined by the governing statute, and where judicial review is available."[203] The court went on to state that "no specific monetary ceiling for the award of damages for humiliation and embarrassment is constitutionally required"[204] because "[h]umiliation and embarrassment are . . . not easily quantified"[205] and imposing a "specific limit could itself be arbitrary."[206] Furthermore, the court noted, "Humiliation and embarrassment lie at the core of the evil which the Kentucky Civil Rights Act was designed to eradicate. If victims are to be fairly compensated for these injuries, the factfinder must be free to assess reasonable damages."[207] Thus, Kentucky's Code is distinguishable from Indiana's because Indiana does not permit damages for emotional distress.[208]

Another difference between the Kentucky and Indiana Codes is that Kentucky permits the KCHR to publicize its orders by notifying the parties, as well as "any other public officers and persons that the commission deems proper."[209] Thus, the KCHR has discretion to inform other individuals of the respondent's discriminatory behavior.

Although these differences are interesting, perhaps the most significant difference between the Kentucky and Indiana civil rights statutes is that Kentucky permits civil litigation and awards attorney's fees that result from the litigation.[210] Section 344.450 of the Kentucky Code states:

> Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together

---

(2007) (limiting the damages available in employment cases to "include only wages, salary, or commissions" and making no provision for pain and suffering, mental anguish, emotional distress, or punitive damages).

202. 625 S.W.2d 852 (Ky. 1981).

203. *Id.* at 855.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *See* IND. CODE § 22-9-1-6(k)(A) (2007) (limiting the damages available in employment cases to "include only wages, salary, or commissions" and making no provision for pain and suffering, mental anguish, emotional distress, or punitive damages).

209. KY. REV. STAT. ANN. § 344.230(2) (West 2006).

210. *Compare id.* § 344.450, *with* IND. CODE §§ 22-9-1-6(k)(A), 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

> with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.[211]

Thus, this provision makes Kentucky's statute more like the Michigan and Illinois Codes than the Indiana Code.[212] Kentucky's procedure provides "alternative sources of relief, one administrative and one judicial."[213] The dual procedures benefit plaintiffs because they provide more extensive procedural protection.[214]

For example, the court in *Meyers v. Chapman Printing Co.*[215] held that "[t]he Kentucky Civil Rights Act creates a jural right as well as a right to redress by administrative procedure. To the extent it creates a jural right both plaintiff and defendant are entitled to a trial by jury."[216] The court justified its holding by noting that the purpose of the Kentucky statute was to give individuals who do not wish to proceed before the KCHR "'an opportunity in circuit court to have the fullest range of remedies allowable.' This, of course, includes trial by jury."[217] In a subsequent case, *Palmer v. International Ass'n of Machinists & Aerospace Workers*,[218] the court confirmed the existence of dual procedures and held that section 344.450 provided a civil cause of action "in addition to any other remedies contained in the chapter."[219]

However, section 344.450 has not been expanded to the point that all employment discrimination issues are tried by a jury.[220] Kentucky courts have determined that some issues, including whether reinstatement and front pay are available remedies under section 344.450, are not appropriate for the jury and should be decided by the court.[221] Thus, in *Brooks v. Lexington-Fayette Urban County Housing Authority*[222] the court indicated that reinstatement "appears to fall within the trial court's power to 'enjoin further violations' under [section]

---

211. KY. REV. STAT. ANN. § 344.450 (West 2006).

212. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104(G) (West 2001), *and* KY. REV. STAT. ANN. § 344.450 (West 2006), *and* MICH. COMP. LAWS ANN. § 37.2802 (West 2001), *with* IND. CODE § 22-9.5-7-2 (2007), *and Adler*, 689 N.E.2d at 1279 (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted).

213. Meyers v. Chapman Printing Co., 840 S.W.2d 814, 820 (Ky. 1992).

214. *See, e.g.*, McNeal v. Armour & Co., 660 S.W.2d 957, 959 (Ky. Ct. App. 1983).

215. 840 S.W.2d 814 (Ky. 1992).

216. *Id.* at 820.

217. *Id.* (quoting Canamore v. Tube Turns Div. of Chemetron Corp., 676 S.W.2d 800, 804 (Ky. Ct. App. 1984)).

218. 882 S.W.2d 117 (Ky. 1994).

219. *Id.* at 120.

220. *See* Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 806 (Ky. 2004).

221. *See id.*

222. 132 S.W.3d 790 (Ky. 2004).

344.450."[223] Therefore, "the decision whether to order reinstatement is an issue for the trial court and not the jury."[224] Even though the plaintiff in *Brooks* was entitled to a jury trial, section 344.450 was limited and not all of the issues were decided by the jury.[225] The *Brooks* court also explicitly indicated that section 344.450 does not permit punitive damages.[226]

D. Michigan

The Michigan Civil Rights Act is more commonly known as the Elliott-Larsen Civil Rights Act.[227] Like surrounding states, the Act outlaws employment discrimination.[228] The investigatory procedure used in Michigan is also similar to surrounding states, and the default means of dispute resolution is an administrative hearing that commences when an allegation of discrimination is filed with the department of civil rights.[229]

After the allegation is thoroughly investigated, if the department is convinced that unlawful discrimination has occurred, the department files charges with the civil rights commission.[230] The commission then conducts a hearing.[231] If the petitioner is successful, the statute permits the commission to deliver "[a] copy of the order . . . to the respondent, the claimant, the attorney general, and to other public officers and persons as the commission deems proper."[232] Thus, similar to Kentucky, which permits its civil rights commission to publicize the result of administrative hearings, Michigan's statute gives the commission the discretion to inform individuals about the hearing's outcome.[233]

The statute goes on to detail what relief is available if unlawful discrimination occurred.[234] All of the administrative remedies are similar to those available in surrounding states.[235] However, Michigan also provides

---

223. *Id.* at 806.

224. *Id.*

225. *Id.*

226. *Id.* at 808 (citing Ky. Dep't of Corr. v. McCullough, 123 S.W.3d 130, 138-39 (Ky. 2003)).

227. MICH. COMP. LAWS ANN. § 37.2101 (West 2001).

228. *See id.* § 37.2202(1) (listing the types of prohibited conduct); *see also* 775 ILL. COMP. STAT. ANN. 5/2-102(A) (West 2001 & Supp. 2008); IND. CODE § 22-9-1-2(a)&(b) (2007); KY. REV. STAT. ANN. § 344.040 (West 2006); OHIO REV. CODE ANN. § 4112.02 (West 2007 & Supp. 2008).

229. *See* MICH. COMP. LAWS ANN. § 37.2602(c) (West 2001).

230. *Id.* § 37.2605(1).

231. *Id.*

232. *Id.*

233. *Compare* KY. REV. STAT. ANN. § 344.230(2) (West 2006), *with* MICH. COMP. LAWS ANN. § 37.2605(1) (West 2001).

234. MICH. COMP. LAWS ANN. § 37.2605(2) (West 2001). Relief includes hiring, reinstatement, and posting notices and reporting compliance to the civil rights commission. *Id.*

235. *See* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001); IND. CODE § 22-9-1-6(k) (2007); KY. REV. STAT. ANN. § 344.230(3) (West 2006); OHIO REV. CODE ANN. § 4112.05(G)(1) (West

additional remedies, which make its civil rights code unique.[236] The statute indicates the availability of remedies including:

> (i) Payment to the complainant of damages for an injury or loss caused by a violation of this act, including a reasonable attorney's fee[; and]
>
> Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees.[237]

In *Department of Civil Rights v. Horizon Tube Fabricating, Inc.*,[238] the Michigan Court of Appeals interpreted the statute and held that an award of attorney fees was reasonable and was not an abuse of discretion.[239] Thus, the appellate court upheld the trial court's judgment as to the attorney fees.[240] The *Horizon Tube* court also noted that awards of interest on backpay were allowed in some situations.[241] The court based this determination on statutory language authorizing the civil rights commission to award "other relief that [it] deems appropriate."[242] Therefore, a Michigan employee can request interest on backpay, and if the civil rights commission deems it appropriate, the commission can grant the request.[243]

Similarly, in *King v. General Motors Corp.*,[244] the court held that although "the decision to grant or deny an award of attorney fees . . . is within the discretion of the trial court,"[245] the legislative intent of the civil rights act indicated that attorney's fees should be granted:

> [A]ttorney fee awards are intended to encourage persons deprived of their civil rights to seek legal redress as well as to ensure victims of employment discrimination access to the courts . . . . A second purpose in allowing attorney fee recovery under the Elliott-Larsen Civil Rights

---

2007).

236. *See* MICH. COMP. LAWS ANN. § 37.2605(2)(i)&(j) (West 2001).

237. *Id.* Sections 37.2605(2)(h) and (k) provide additional remedies for individuals who suffer housing discrimination. *Id.* § 37.2605(2)(h)&(k). For example, section 37.2605(2)(k) indicates that a civil fine is a possible remedy "for a violation of [section 33.2501] of this act." *Id.* § 37.2605(2)(k). The amount of the fine is to be "directly related to the cost to the state for enforcing this statute [and is] not to exceed: $10,000.00 for the first violation . . . $25,000.00 for the second violation within a 5-year period . . . [or] $50,000.00 for 2 or more violations within a 7-year period." *Id.* § 37.2605(2)(k)(i)-(iii).

238. 385 N.W.2d 685 (Mich. Ct. App. 1986).

239. *Id.* at 688-89.

240. *Id.*

241. *Id.* at 689-90.

242. MICH. COMP. LAWS ANN. § 37.2605(2)(*l*) (West 2001).

243. *Horizon Tube Fabricating, Inc.*, 385 N.W.2d at 690.

244. 356 N.W.2d 626 (Mich. Ct. App. 1984).

245. *Id.* at 629.

> Act is to obtain compliance with the goals of the act and thereby deter discrimination in the work force.[246]

In Michigan, as in Kentucky, an administrative remedy is not a plaintiff's sole remedy.[247] According to section 37.2801,

> (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both[; and]
>
> (2) An action commenced pursuant to [this subsection] may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.[248]

Thus, unlike Indiana, Michigan permits civil litigation.[249] This portion of the statute has been interpreted to allow not just civil trials, but civil jury trials. Indeed, the *King* court emphasized this point when it stated that although "the Elliott-Larsen Civil Rights Act is silent on the right to a trial by jury, we find that jury trials are a litigant's right under the act."[250] Thus, *King* indicates that Michigan's civil rights laws are similar to Kentucky's and unlike Indiana's.[251]

As a result of the civil trial provision contained in section 37.2801, injured Michigan employees often recover sizable damage awards.[252] Furthermore, section 37.2801 permits plaintiffs to recover for mental anguish or emotional distress.[253] For example, in *Slayton v. Michigan Host, Inc.*,[254] the court determined that the plaintiff, who was fired after she sued her employer because he forced her to wear a revealing uniform, had a cause of action under section 37.2801.[255] The court emphasized that

---

246. *Id.* (citations omitted).

247. *See* KY. REV. STAT. ANN. § 344.450 (West 2006); MICH. COMP. LAWS ANN. § 37.2801(1)-(2) (West 2001).

248. MICH. COMP. LAWS ANN. § 37.2801(1)-(2) (West 2001).

249. *Compare id.* § 37.2801, *with* IND. CODE § 22-9-1-16 (2007) (permitting an election of civil litigation only in narrow circumstances).

250. *King*, 356 N.W.2d at 629.

251. *See id. Compare* KY. REV. STAT. ANN. § 344.450 (West 2006), *and* MICH. COMP. LAWS ANN. § 37.2801 (West 2001), *with* IND. CODE §§ 22-9-1-16, 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

252. *See, e.g.*, Lilley v. BTM Corp., 958 F.2d 746, 754 (6th Cir. 1992) (damage award of $350,000 not excessive).

253. *See, e.g.*, *Lilley*, 958 F.2d at 754 (citing Slayton v. Mich. Host, 332 N.W.2d 498, 500-01 (Mich. Ct. App. 1983)); Moody v. Pepsi-Cola Metro. Bottling Co., 915 F.2d 201, 209-11 (6th Cir. 1990).

254. 332 N.W.2d 498 (Mich. Ct. App. 1983).

255. *Id.* at 501.

> a victim of discrimination may bring a civil suit to recover for damages for any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish which flow from the discrimination injury . . . . These types of injuries are the kind that the Elliott-Larsen Civil Rights Act was designed to protect against and to hold otherwise would undercut the legislative scheme to remedy discriminatory wrongs.[256]

Because the plaintiff in *Slayton* had suffered mental anguish from the sexual discrimination, she was entitled to recover damages.[257] However, unlike Ohio,[258] Michigan does not allow punitive damage awards in employment discrimination cases.[259] This was made explicit when the *King* court stated, "[W]e find error in the instructions to the jury allowing . . . exemplary damages. . . . We thus vacate the exemplary damages award."[260]

V. RECOMMENDATIONS FOR INDIANA

Comparing Indiana's civil rights law to those of Kentucky, Ohio, Michigan, and Illinois indicates that Indiana's protections fall short of those in surrounding states. Indiana should amend its civil rights law to ensure that employees who suffer unlawful discrimination are thoroughly compensated. The most effective and efficient way to update Indiana's law is to draw inspiration from the civil rights laws of surrounding states. Although Indiana should not wholly adopt the civil rights laws of Michigan, Kentucky, Ohio, or Illinois, looking to these states' laws for guidance is prudent.

A. Permit Civil Suits Without Requiring Consent from Both Parties

Section 22-9-1-16 of the Indiana Code differs from that of any surrounding state. By allowing civil litigation only when both the complainant and the respondent consent, Indiana makes it nearly impossible for individuals to have their cases adjudicated by a judge in a courtroom. To abrogate this problem Indiana should look to the Kentucky, Ohio, and Michigan civil rights laws, all of which permit civil trials.[261] Ohio's Code states, "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief."[262] However, similar to Indiana's Code, this provision does not apply if

---

256. *Id.* at 500-01.

257. *Id.* at 501.

258. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999) (allowing punitive damages in cases brought under section 4112.99 as long as actual malice was shown).

259. *See* King v. Gen. Motors Corp., 356 N.W.2d 626, 628 (Mich. Ct. App. 1984).

260. *Id.* (citing Veselenak v. Smith, 327 N.W.2d 261, 262 (Mich. 1982)); *accord* Dep't of Civil Rights *ex rel.* Johnson v. Silver Dollar Café, 499 N.W.2d 409, 410 (Mich. Ct. App. 1993) (per curiam).

261. *See* KY. REV. STAT. ANN. § 344.450 (West 2006); MICH. COMP. LAWS ANN. § 37.2801(1)-(2) (West 2001); OHIO REV. CODE ANN. § 4112.99 (West 2007).

262. OHIO REV. CODE ANN. § 4112.99 (West 2007).

an individual first files suit with the Ohio Civil Rights Commission.[263] Therefore, individuals who are not aware that civil litigation is an option may be unable to obtain a trial if they initially pursue an administrative remedy. Nevertheless, Ohio's provision is preferable to Indiana's provision because Ohio expressly permits civil litigation and makes the right to a civil trial distinct from the other available remedies.[264]

Kentucky's approach is similar to Ohio's because Kentucky expressly permits civil litigation.[265] Furthermore, Kentucky provides complainants more options and more remedies than Indiana because the Kentucky Code has been construed as providing a civil cause of action in addition to other remedies.[266] Because Kentucky's Code explicitly states that civil litigation is available along with other remedies,[267] the state's statute seems more complainant-friendly than Ohio's statute.

Finally, as in Kentucky and Ohio, Michigan's statute provides for civil trials.[268] However, Michigan's statutory language[269] is not as clear as Kentucky's. Therefore, based on the clarity and scope of the code provision, Indiana should adopt Kentucky's statutory language[270] and interpretation[271] and allow civil trials in addition to other remedies.

B. Permit Jury Trials

Indiana is also an outlier with respect to jury trials. Indeed, section 22-9-1-17 of the Indiana Code explicitly states that a "civil action filed under [section 22-9-1-17] must be tried by the court without benefit of a jury."[272] Thus, Indiana is distinguishable from Kentucky, Ohio, and Michigan, which all allow discrimination cases to be tried, at least to some extent, by a jury.[273]

---

263. *See* IND. CODE § 22-9-1-16(b) (2007); Kocak v. Cmty. Health Partners of Ohio, Inc., 2005 FED App. 0127P, 400 F.3d 466, 472 (6th Cir.).

264. *See* Kramer v. Windsor Park Nursing Home, Inc., 943 F. Supp. 844, 856 (S.D. Ohio 1996) (emphasizing that section 4112.99 creates a private right of action "separate and distinct from those remedies available in other sections" of the civil rights statute).

265. *See* KY. REV. STAT. ANN. § 344.450 (West 2006); OHIO REV. CODE ANN. § 4112.99 (West 2007).

266. *See* Palmer v. Int'l Ass'n of Machinists & Aerospace Workers, 882 S.W.2d 117, 120 (Ky. 1994) (section 344.450 provides a civil cause of action "in addition to any other remedies contained in the chapter").

267. *See id.*

268. *See* MICH. COMP. LAWS ANN. § 37.2801(1)-(2) (West 2001).

269. *See id.*

270. *See* KY. REV. STAT. ANN. § 344.450 (West 2006)

271. *See Palmer*, 882 S.W.2d at 120.

272. IND. CODE § 22-9-1-17(c) (2007).

273. *See* Meyers v. Chapman Printing Co. Inc., 840 S.W.2d 814, 819-20 (Ky. 1992); King v. Gen. Motors Corp., 356 N.W.2d 626, 629 (Mich. Ct. App. 1984); Taylor v. Nat'l Group of Cos., 605 N.E.2d 45, 46 (Ohio 1992).

Kentucky case law indicates that "[t]he Kentucky Civil Rights Act creates a jural right as well as a right to redress by administrative procedure. To the extent it creates a jural right both plaintiff and defendant are entitled to a trial by jury."[274] Thus, although the Kentucky statute never explicitly states that jury trials are available, the *Meyers* court emphasized that the purpose of the statute was to give individuals a full range of remedies.[275] However, in recent years Kentucky courts have limited the application of this decision and restricted the right to a jury trial by designating some issues for judicial resolution.[276]

Although Ohio permits jury trials in some employment discrimination cases, the determination is made on a case-by-case basis. For example, the court in *Taylor v. National Group of Companies*,[277] permitted the plaintiff in a sex discrimination case to demand a jury trial.[278] In contrast, in *Hoops v. United Telephone Co.*,[279] an age discrimination case, the court declined the plaintiff's jury request.[280] Because Ohio's stance on the right to jury trial is somewhat unclear, Indiana should look elsewhere for guidance when revising this portion of its civil rights law.

Michigan's statute is preferable to Ohio's because in Michigan, administrative remedies are not the sole compensation for the injured plaintiff[281] and civil litigation is permitted.[282] Furthermore, the court in *King v. General Motors Corp.* indicated that although "the Elliott-Larsen Civil Rights Act is silent on the right to a trial by jury, . . . jury trials are a litigant's right under the act."[283] Thus, *King* illustrates that Michigan's laws are similar to Kentucky's laws.[284]

By permitting jury trials, Kentucky and Michigan allow complainants an opportunity to present their claims to a jury of their peers, which provides a

---

274. *Meyers*, 840 S.W.2d at 820.

275. *See id.*

276. *See* Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 806 (Ky. 2004) (holding that since reinstatement and availability of front pay are equitable remedies, they are issues resolved by the court, not the jury).

277. 605 N.E.2d 45 (Ohio 1992).

278. *Id.* at 46.

279. Hoops v. United Tel. Co., 553 N.E.2d 252 (Ohio 1990).

280. *Id.* at 256-57 (denying the right to jury trial because the right did not exist at common law).

281. *See* MICH. COMP. LAWS ANN. § 37.2801(1)&(2) (West 2001) ("A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both [and a]n action commenced pursuant to [this subsection] may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.").

282. *See id.* § 37.2801(1) (West 2001).

283. King v. Gen. Motors Corp., 356 N.W.2d 626, 629 (Mich. Ct. App. 1984).

284. *Id.*; *see also* KY. REV. STAT. ANN. § 344.450 (West 2006); MICH. COMP. LAWS ANN. § 37.2801 (West 2001); Meyers v. Chapman Printing Co. Inc., 840 S.W.2d 814, 819-20 (Ky. 1992).

benefit unavailable to Indiana employees.[285] Furthermore, because plaintiffs' success rates before juries are slightly higher than success rate before a judge[286] and because jury trials have a deterrent effect on other employers,[287] Indiana should adopt language from Michigan's Code and give plaintiffs the option to proceed before a jury.

C. Expand Damage Provisions to Provide More Complete Compensation

One of the major shortcomings of Indiana's Code is that it drastically limits the damages available to employees injured by unlawful discrimination.[288] In contrast, Kentucky provides a full panoply of remedies in employment discrimination cases.[289] Indeed, in Kentucky, damages are available for both humiliation and personal indignity.[290]

Similarly, Illinois provides more expansive damage provisions than Indiana.[291] According to the Illinois Code, relief may include "such action as may be necessary to make the individual complainant whole, including, but not limited to, *awards of interest on the complainant's actual damages and backpay from the date of the civil rights violation.*"[292] By allowing the victorious party to recover backpay and interest on damages,[293] Illinois's civil rights act seems more plaintiff-friendly. Furthermore, Illinois case law indicates that punitive damages are permitted when "highly appropriate and necessary."[294] Although this language gives the court a great deal of discretion, addition of Illinois's language to the Indiana statute would be a definite improvement.

Ohio also allows recovery of more damages than Indiana.[295] Ohio's Code has been interpreted to permit punitive damage awards when actual malice can be

---

285. *See* KY. REV. STAT. ANN. § 344.450 (West 2006); MICH. COMP. LAWS ANN. § 37.2801 (West 2001); *Meyers*, 840 S.W.2d at 819-20; *King*, 356 N.W.2d at 629.

286. Oppenheimer, *supra* note 82, at 523.

287. *See* Johnson, *supra* note 756 at 216 (discussing the deterrent effect of public resolution of a dispute).

288. *See* IND. CODE § 22-9-1-6(k)(A) (2007) (damages limited to those necessary "to restore complainant's losses incurred as a result of discriminatory treatment," which in an employment context includes "only wages, salary, or commissions"). Similarly, in Michigan punitive damages are not available in employment discrimination cases. *See King*, 356 N.W.2d at 628 ("[W]e find error in the instructions to the jury allowing both compensatory and exemplary damages for plaintiff's mental and emotional distress and anguish. We thus vacate the exemplary damages award . . . .").

289. *See Meyers*, 840 S.W.2d at 819 (allowing damages for mental and emotional injury).

290. McNeal v. Armour & Co., 660 S.W.2d 957, 958 (Ky. Ct. App. 1983).

291. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001), *with* IND. CODE § 22-9-1-6(k) (2007).

292. 775 ILL. COMP. STAT. ANN. 5/8A-104(J) (West 2001) (emphasis added).

293. *Id.*

294. Page v. City of Chicago, 701 N.E.2d 218, 228 (Ill. App. Ct. 1998).

295. OHIO REV. CODE ANN. § 4112.05(G)(1)(a) (West 2007 & Supp. 2008).

shown.[296] In contrast, Indiana does not permit punitive damages in employment discrimination cases.[297] Ohio case law also indicates that in some situations front pay may be awarded.[298] However, Ohio's Code provision is not the best choice for Indiana because Ohio requires the plaintiff to prove actual malice in order to demand punitive damages.[299] Because Ohio places this burden on the plaintiff, Indiana should look to either Illinois or Kentucky for guidance when expanding its damage provision.

Although there is some variation among surrounding states with respect to damages in employment discrimination cases, neighboring states, with the exception of Michigan, all have more extensive damage provisions than Indiana. Thus, despite the similarity to Michigan law, Indiana should revise its provision on damages and, at the very least, adopt language similar to Illinois's statute, which allows interest on damage awards, as well as backpay.

Furthermore, as written, the ICRL provides fewer remedies than the federal law does under Title VII. As a result, Indiana plaintiffs will attempt to litigate in federal court whenever possible.[300] However, because Title VII caps compensatory damage awards[301] and does not apply to all employers, it is not a feasible remedy for many plaintiffs.[302] Although adopting some of Title VII's damage provisions would certainly improve Indiana's statute, the best choice is adopting language from either Illinois or Michigan to expand Indiana's damage provisions.

D. Provide Attorney's Fees to the Prevailing Party

The final difference between Indiana's civil rights statute and those of surrounding states is that Indiana does not award attorney's fees to the prevailing party.[303] Even Michigan, which, like Indiana, refuses to award punitive damages,

---

296. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999); Berge v. Columbus Cmty. Cable Access, 736 N.E.2d 517, 542 (Ohio Ct. App. 1999).

297. *See* IND. CODE § 22-9-1-6(k) (2007); Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (holding that emotional distress and punitive damages are not available under the Indiana Civil Rights Law), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

298. *See* Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 517-18 (Ohio Ct. App. 1995) ("Front pay is available as a remedy for . . . race discrimination, age discrimination, and sex discrimination. . . . [F]ront pay is available for handicap discrimination as well, when appropriate. [However, t]he trial judge must determine if front pay is appropriate and [then] the jury determines the amount of front pay." (citations omitted)).

299. *See Rice*, 704 N.E.2d at 1221; *Berge*, 736 N.E.2d at 542.

300. *See* Gonzalez, *supra* note 116, at 116.

301. *Id.*

302. 42 U.S.C. § 2000e(b) (2006) (defining the term "employer").

303. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104(G) (West 2001), *and* MICH. COMP. LAWS ANN. § 37.2801(3) (West 2001), *with* IND. CODE § 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has

allows the victorious party to recover attorney's fees.[304] Michigan's statute states that damages in employment discrimination cases include "[p]ayment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees."[305] The statute also emphasizes that "[a]s used in [this subsection], 'damages' means damages for injury or loss caused by each violation of this act, *including reasonable attorney's fees*."[306] In *King* the court explained that allowing recovery of attorney's fees is important for policy purposes.[307] The court stated that attorney's fees should be liberally granted because "attorney fee awards are intended to encourage persons deprived of their civil rights to seek legal redress as well as to ensure victims of employment discrimination access to the courts."[308] Furthermore, "allowing attorney fee recovery . . . [facilitates] compliance with the goals of the act and thereby deter[s] discrimination in the work force."[309]

Similarly, Illinois's and Kentucky's civil rights statutes permit the prevailing party to recover his or her attorney's fees.[310] Thus, the Kentucky, Michigan, and Illinois civil rights codes are similar and the Indiana Code is an outlier.[311] By

---

proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

304. MICH. COMP. LAWS ANN. § 37.2605(2)(i)&(j) (West 2001).

305. *Id.* Sections 37.2605(2)(h) and (k) provide additional remedies for individuals who suffer housing discrimination. *Id.* § 37.2605(2)(h)&(k). For example, section 37.2605(2)(k) indicates that a civil fine is a possible remedy "for a violation of [the civil rights statute] of this act." *Id.* § 37.2605(2)(k). The amount of the fine is to be "directly related to the cost to the state for enforcing this statute [and is] not to exceed: $10,000.00 for the first violation . . . $25,000.00 for the second violation within a 5-year period . . . [or] $50,000.00 for 2 or more violations within a 7-year period." *Id.* § 37.2605(2)(k)(*i*)-(*iii*).

306. *Id.* § 37.2801(3) (emphasis added).

307. King v. Gen. Motors Corp., 356 N.W.2d 626, 629 (Mich. Ct. App. 1984).

308. *Id.*

309. *Id.*

310. *See* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001) (stating that damages may include "[p]ay[ing] to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees incurred in maintaining this action . . . and in any judicial review and judicial enforcement proceedings"); KY. REV. STAT. ANN. § 344.450 (West 2006) (stating that "[a]ny person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter").

311. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001), *with* KY. REV. STAT. ANN. § 344.450 (West 2006), *and* MICH. COMP. LAWS ANN. § 37.2801(3) (West 2001), *with* IND. CODE § 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding

awarding attorney's fees, surrounding states make it more feasible for complainants to litigate disputes. In order to provide individuals injured by employment discrimination full compensation for their injuries, Indiana should allow the prevailing party to recoup his or her attorney's fees.

CONCLUSION

State civil rights laws affect every individual living or working in the geographic area. Civil rights laws are especially relevant in employment contexts because they impact the day to day activities of almost all citizens. Although Title VII has done much to diminish discrimination and improve the working environment for individuals, it is not enough. Therefore, States must enact unbiased, effective anti-discrimination laws to protect employees, as well as employers. Unfortunately, Indiana appears to be lagging behind surrounding states with respect to protection of employee civil rights. Unlike the surrounding states of Michigan, Ohio, Kentucky, and Illinois, Indiana requires both parties to consent to a civil trial, which means that many complainants will be forced to rely on the administrative procedure.[312] To increase the protection afforded employees, Indiana should look to the civil rights laws of surrounding states and use these statutes to guide a revision of the Indiana Code.

---

attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

312. IND. CODE § 22-9-1-16 (2007).

TEACHERS' SEXUAL HARASSMENT CLAIMS BASED ON STUDENT CONDUCT: DO SPECIAL EDUCATION TEACHERS WAIVE THEIR RIGHT TO A HARASSMENT-FREE WORKPLACE?

DAVID THOMPSON*

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an individual's sex.[1] Title VII imposes sexual harassment liability on employers that subject their employees to a "hostile work environment."[2] A hostile work environment (HWE) is a workplace that is "permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[3] Although the conduct of a supervisor or co-worker normally creates a HWE, the conduct of non-employees can also create a HWE.[4] In HWE cases, employers are liable if they know about the harassment and fail to take remedial action in a timely manner.[5]

In June 2007, in *Mongelli v. Red Clay Consolidated School District Board of Education*,[6] the District Court of Delaware faced the novel issue of whether a school board may be held liable for a Title VII HWE sexual harassment claim based on the harassing conduct of a special education student.[7] In *Mongelli*, a fourteen-year-old mentally-impaired student, over the course of two weeks, abused his special education teacher, both verbally and physically.[8] The teacher, Ms. Mongelli, alleged that she repeatedly complained of the student's conduct through written reports she filed with the principal's office and through verbal complaints she made to the assistant principal.[9] She further alleged that the school did not take any remedial action during the two-week period over which

---

* J.D. Candidate, 2009, Indiana University School of Law—Indianapolis; B.A., 2004, DePauw University, Greencastle, Indiana.

1. 42 U.S.C. § 2000e-2(a)(1) (2006).

2. *See, e.g.*, Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

3. *Id.* at 21 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)).

4. *See* Lori A. Tetreault, Annotation, *Liability of Employer, Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.) for Sexual Harassment of Employee by Customer, Client, or Patron*, 163 A.L.R. FED. 445 (2000).

5. *See id.*; *see also* EEOC Guidelines, 29 C.F.R. § 1604.11(e) (2008) ("An employer may also be responsible for the acts of non-employees . . . where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action.").

6. 491 F. Supp. 2d 467 (D. Del. 2007).

7. *Id.* at 476-78.

8. *Id.* at 471-73.

9. *Id.* at 471-72.

the incidents occurred.[10]

The court in *Mongelli* held that, although schools can be liable for a HWE sexual harassment claim created by the conduct of a special education student, Mongelli's claim failed because the student's conduct was not "severe or pervasive" enough to meet the requirements for a Title VII claim.[11]

The *Mongelli* decision has important implications for the thousands of special education teachers across the nation. Over 600,000 children between the ages of six and twenty-one classified as mentally retarded were educated by the U.S. Department of Education under the Individuals with Disabilities Education Act during the 2000-01 school year.[12] The number soars to a staggering 5,775,000 children when other disabilities are also considered.[13] If schools are not held liable for HWEs created by the acts of special education students, the thousands of teachers responsible for educating these students essentially forfeit a portion of their right to be free from sexual harassment in the workplace.

This Note explores the parameters of school liability for HWE sexual harassment claims brought by teachers. Part I addresses the background of Title VII sexual harassment claims. Part II takes an in-depth look at the factual background of the *Mongelli* case as well as the *Mongelli* court's holdings. Part III analyzes the *Mongelli* court's holdings. It argues that the *Mongelli* court's preliminary holdings are valid and that the grant of summary judgment is defensible in light of existing case law and the imprecise nature of the test courts must apply in Title VII HWE cases. Part IV discusses the future of Title VII sexual harassment claims brought by teachers who allege sexual harassment by students. This section suggests measures that schools should take to ensure that they are not liable for the harassing conduct of students and will conclude by discussing the appropriate analysis courts should employ when analyzing similar claims.

I. TITLE VII SEXUAL HARASSMENT BACKGROUND

"Congress enacted Title VII of the Civil Rights Act of 1964 to protect employees from discrimination in the workplace."[14] Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[15] Although Title VII's language clearly prohibited sex discrimination, it did not "define sexual harassment as discrimination, nor did its legislative

---

10. *Id.* at 473.

11. *Id.* at 480.

12. TWENTY-FOURTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 20 (2002), *available at* http://www.ed.gov/about/reports/annual/osep/2002/section-ii.pdf.

13. *Id.*

14. Jeffrey S. Lyons, *Be Prepared: Unsuspecting Employers Are Vulnerable for Title VII Sexual Harassment Environment Claims*, 37 U.S.F. L. REV. 467, 467 (2003) (citations omitted).

15. 42 U.S.C. § 2000e-2(a) (2006).

history offer guidance as to whether sexual harassment was a form of discrimination."[16] As a result of this ambiguity, courts did not begin to "recognize sexual harassment as a type of sex discrimination prohibited by Title VII" until the late 1970s.[17]

"The first type of Title VII sexual harassment claims courts recognized" was Quid pro quo (QPQ) sexual harassment.[18] QPQ sexual harassment occurs when an employer conditions "an employee's future employment status on their response to the sexual advances" of the employer.[19] The most obvious example of QPQ sexual harassment is when a supervisor promises a subordinate employee a promotion in exchange for sexual activities or threatens the employee that refusing to engage in sexual activity will result in termination.[20]

The second type of sexual harassment claim courts recognized was HWE sexual harassment.[21] Hostile work environment was first recognized in the form of racial discrimination.[22] In *Rogers v. EEOC*,[23] the Fifth Circuit "reasoned that Title VII prohibited discriminatory working environments that could destroy the emotional and psychological stability of minority employees; thus, statutory protection extended beyond economic or tangible discrimination."[24] Although *Rogers* did not apply to sexual discrimination,[25] after the *Rogers* decision the Equal Employment Opportunity Commission (EEOC) "issued guidelines declaring hostile work environment sexual harassment a violation of Title VII."[26] These guidelines "essentially created a new form of Title VII action"[27] now known as HWE sexual harassment.[28] Although the EEOC guidelines were

---

16. Sarah Pahnke Reisert, *Let's Talk about Sex Baby:* Lyle v. Warner Brothers Television Productions *and the California Court of Appeal's Creative Necessity Defense to Hostile Work Environment Sexual Harassment*, 15 AM. U.J. GENDER SOC. POL'Y & L. 111, 115 (2006) (citations omitted).

17. Kelly Ann Cahill, *Hooters: Should There Be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1110 (1995); *see also* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

18. Cahill, *supra* note 17, at 1110.

19. *Id.*

20. *See* Robert J. Aalberts & Lorne H. Seidman, *Sexual Harassment of Employees by Non-employees: When Does the Employer Become Liable?*, 21 PEPP. L. REV. 447, 455 (1994).

21. *See* Lyons, *supra* note 14, at 470; Tetreault, *supra* note 4, § 2[a].

22. Reisert, *supra* note 16, at 115.

23. 454 F.2d 234 (5th Cir. 1971), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-5 (2006), *as recognized in* EEOC v. Shell Oil Co., 466 U.S. 54, 63 (1984).

24. Reisert, *supra* note 16, at 115.

25. *Id.*

26. *Id.* (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §§ 1604.11(a)-(f) (2008)). The EEOC guidelines, which were issued in 1980, state, in pertinent part, that conduct which has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment," is a violation of Title VII.

27. Lyons, *supra* note 14, at 470.

28. *Id.*

adopted in 1980, it was not until 1986 that the Supreme Court recognized HWE sexual harassment.[29]

A. The Supreme Court Recognizes, Defines, and Refines HWE Claims

In four landmark decisions, the United States Supreme Court established a framework for HWE sexual harassment cases.[30]

1. Meritor Savings Bank, F.S.B. v. Vinson.[31]—The Supreme Court first recognized a Title VII HWE sexual harassment claim in *Meritor Savings Bank, F.S.B. v. Vinson.* In *Meritor*, a female bank teller alleged that throughout her four-year employment at the defendant bank her supervisor fondled her, repeatedly demanded sex from her (to which she consented on multiple occasions out of "fear of losing her job"),[32] and raped her on several occasions.[33] The bank argued that the plaintiff did not have an actionable claim because Title VII required a tangible loss of an economic character, and did not protect "'purely psychological aspects of the workplace environment.'"[34] The Court rejected this argument.[35] Justice Rehnquist, writing for the Court, opined that "Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[36] The Court then acknowledged that the EEOC guidelines allowed HWE claims and also extended the reasoning from *Rogers* to the sexual context of Meritor's case.[37] The Court concluded by stating that, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[38]

Although *Meritor* was a victory for victims of workplace sexual harassment in that the Court officially recognized HWE claims, the Court also placed a very significant limitation on these claims by requiring the harassment to be "sufficiently *severe or pervasive* 'to alter the conditions of [the victim's] employment and create an abusive working environment."[39] The "severe or pervasive" requirement is a difficult one to satisfy; often, it is the hurdle

---

29. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986).

30. An affirmative defense to HWE sexual harassment claims is actually set forth in the sister cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

31. 477 U.S. 57 (1986).

32. *Id.* at 60.

33. *Id.*

34. *Id.* at 64 (quoting Brief of Petitioner at 30-31, 34, Meritor Sav. Bank, FSB v. Vinson, No. 84-1979 (U.S. Dec. 11, 1985)).

35. *Id.*

36. *Id.* (citations omitted).

37. *Id.* at 65-66.

38. *Id.* at 66.

39. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (emphasis added).

plaintiffs cannot overcome when trying to defeat a motion for summary judgment.[40] Although the *Meritor* Court required that harassment be severe or pervasive, "the opinion fell short of providing any clear guidance as to what would be considered severe or pervasive enough to create such an environment."[41] For example, the Court did not address whether the conduct must be severe enough to cause the plaintiff psychological injuries. The Court also failed to specify whether the environment must be hostile according to a reasonable person standard or simply according to the plaintiff's subjective view of the environment. The Court, however, answered these questions in the following cases.

2. Harris v. Forklift Systems, Inc.[42]—In *Harris*, a female manager for an equipment rental company alleged that the company's male president regularly insulted her due to her gender[43] and made sexual innuendos about her clothing.[44] After Harris complained about the president's conduct, the president promised the conduct would stop.[45] Instead, Harris was compelled to quit when the president accused her, in front of her coworkers, of promising to have sex with a customer.[46] The district court ruled for the defendants because the president's comments were not severe enough to interfere with the work performance of "[a] reasonable woman manager under like circumstances"[47] and Harris herself was not "so offended that she suffered injury."[48]

After the Sixth Circuit affirmed,[49] the Supreme Court granted certiorari to resolve a circuit split about whether, in HWE sexual harassment claims, the harassing conduct "must 'seriously affect an employee's psychological well-being' or lead the plaintiff to 'suffer injury.'"[50] As one commentator noted, the "facts of *Harris* placed the issue squarely before the Court to determine how the

---

40. *See e.g.*, Van Horn v. Specialized Support Servs., Inc., 241 F. Supp. 2d 994, 1008-09 (S.D. Iowa 2003) (severe or pervasive element not met where a mentally impaired patient touched the plaintiff's breasts on two occasions, pinched her inner thigh on another, and made sexually suggestive comments).

41. Lyons, *supra* note 14, at 471-72.

42. 510 U.S. 17 (1993).

43. *Id.* at 19. Harris alleged that the president made statements such as: "You're a woman, what do you know," "We need a man as the rental manager," and at least once referred to her as a "dumb ass woman." *Id.* It is interesting to note that this factual scenario would never, by today's standards, create a HWE. However, the Court granted certiorari because it wanted to resolve a circuit split. *Id.* at 20.

44. *Id.* at 19.

45. *Id.*

46. *Id.*

47. *Id.* at 20 (quoting Harris v. Forklift Sys., Inc., No. 3-89-0557, 1991 WL 487444, at *7 (M.D. Tenn. Feb. 4, 1991)).

48. *Id.*

49. Harris v. Forklift Sys., Inc., 976 F.2d 733 (6th Cir. 1992).

50. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993) (internal punctuation omitted).

'severe and pervasive' analysis should be applied."[51]

In resolving the circuit split, the *Harris* Court held that harassing conduct in a HWE claim does *not* have to cause the plaintiff psychological injury.[52] More importantly, the Court added the requirement that the environment created by the conduct must be perceived, both objectively and subjectively, as hostile or abusive.[53] The Court stated:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.[54]

Thus, under this requirement, the plaintiff herself[55] must actually perceive the environment as abusive and the plaintiff must show that a reasonable person would also find the environment hostile or abusive.[56]

After acknowledging that the objective and subjective test was not, and could not be, "mathematically precise,"[57] the *Harris* Court stated that when determining whether an environment is hostile, courts must look *at all the circumstances*.[58] The Court went on to give examples of factors that the lower courts should consider, namely "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[59]

These four factors—frequency, severity, physical threats versus offensive

---

51. Lyons, *supra* note 14, at 472.

52. *Harris*, 510 U.S. at 22.

53. *Id.* at 21-22.

54. *Id.*

55. Although the victim of sexual harassment is typically female, the subjective and objective test applies to both males and females. *See* Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination . . . protects men as well as women.") (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)).

56. *See* Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111 (8th Cir. 1997) ("[C]onduct must be sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive.").

57. *Harris*, 510 U.S. at 22. Interestingly, Justice Scalia filed a concurring opinion in which he complained that the standard adopted by the majority was unclear and gave little guidance to juries; he was, however, forced to join the majority because he could not find a valid alternative "to the course the Court today has taken." *Id.* at 24 (Scalia, J., concurring).

58. *Id.* at 23 (emphasis added). This approach is known as the "totality of the circumstances" approach. This name comes from the EEOC Guidelines, which state: "In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 C.F.R. § 1604.11(b) (2008).

59. *Harris*, 510 U.S. at 23.

utterances, and unreasonable interference with work performance—although not exhaustive, comprise the majority of the analysis that courts consider when determining whether the severe or pervasive threshold has been met.[60] The Court further refined the totality of the circumstances test in *Oncale v. Sundowner Offshore Services, Inc.*[61]

3. Oncale v. Sundowner Offshore Services, Inc.—In *Oncale*, the plaintiff, a homosexual male, alleged that he was harassed by his male coworkers.[62] The lower courts ruled that Oncale did not have an actionable Title VII claim because his alleged harassers were also male.[63] Like in *Harris*, the Court granted certiorari to resolve a split among the circuit courts.[64] The *Oncale* Court held that plaintiffs could bring HWE sexual harassment claims based on harassing conduct from coworkers of the same sex.[65] Writing for a unanimous Court, Justice Scalia was careful to emphasize that this holding did not expand Title VII into a "general civility code."[66] The Court insisted that it avoided such a result because of the crucial importance the Court has always given to the *Harris* requirement that the environment be objectively hostile.[67] The *Oncale* Court continued, further defining *Harris*'s objective severity of harassment requirement:

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the *social context* in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectation, and relationships which are not fully captured by a simple

---

60. *See* Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270-71 (2001) (using only the *Harris* factors); Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998) (applying the four factors but noting that they were not exhaustive); Crist v. Focus Homes, Inc., 122 F.3d 1107, 1111 (8th Cir. 1997) (considering the *Harris* factors and the plaintiffs' expectations given their choice of employment); Van Horn v. Specialized Support Servs., Inc., 241 F. Supp. 2d 994, 1008 (S.D. Iowa 2003) (relying on the *Harris* factors).

61. 523 U.S. 75 (1998).

62. *Id.* at 77. Besides being subjected to regular verbal abuse, Oncale was physically assaulted by two coworkers, one of whom threatened to rape him. *Id.*

63. *Id.*

64. *See id.* at 79 (noting that "state and federal courts have taken a bewildering variety of stances" on the issue of same sex HWE sexual harassment claims).

65. *Id.*

66. *Id.* at 81.

67. *Id.* The Court viewed the important emphasis it gives to the objectively hostile requirement as "sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'" *Id.*

recitation of the words used or the physical acts performed.[68]

Two very important conclusions necessarily result from the Court's statement. First, the objective hostility standard used in HWE claims looks at the reasonable person *in the plaintiff's position*.[69] Thus, if a female construction worker brings an HWE sexual harassment claim, a court must determine whether the alleged conduct would be sufficiently hostile to the reasonable female construction worker, who will almost certainly differ from the reasonable female librarian.[70] Second, courts must look at the social context surrounding alleged events.[71] Courts must examine the work environment in which conduct occurs. Returning to the construction example, off-color jokes and vulgar language might be the norm for a construction site,[72] but these activities would probably never be tolerated, let alone be considered normal, in a library.

4. Ellerth *and* Faragher.—In the companion cases of *Burlington Industries, Inc. v. Ellerth*[73] and *Faragher v. City of Boca Raton*,[74] the Supreme Court established an affirmative defense for employers in Title VII HWE claims. Before recognizing the defense, the Court established that in Title VII claims, agency principles apply. Employers may be held vicariously liable for the discriminatory conduct of their supervisors.[75] In order to "square" this holding with "*Meritor*'s holding that an employer is not 'automatically' liable"[76] for the discriminatory acts of its supervisors, the Court formulated an affirmative defense that allowed employers to avoid liability in certain situations.[77] To invoke the defense, an employer must show, by a preponderance of the evidence, that the following two elements are met: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

---

68. *Id.* at 81-82 (quoting Harris v. Forklift Sys. Inc., 510 U.S. 17, 23 (1993)) (emphasis added).

69. *Id.*

70. *See* Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J.L. & FEMINISM 65, 101 (2006) (comparing the severe and pervasive requirement for blackjack dealers, exotic dancers, and legal prostitutes).

71. *Oncale*, 523 U.S. at 81.

72. *See* Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995). In *Gross*, a female truck driver for a construction company alleged that her supervisor's repeated use of vulgarity and profanity created a HWE. *Id.* at 1536. The *Gross* court recognized that in the "real world of construction work, profanity and vulgarity are not perceived as hostile or abusive. Indelicate forms of expression are accepted or endured as normal human behavior." *Id.* at 1537.

73. 524 U.S. 742 (1998).

74. 524 U.S. 775 (1998).

75. *See id.* at 807; *see also Ellerth*, 524 U.S. at 765.

76. *Faragher*, 524 U.S. at 804.

77. *Id.* at 807.

otherwise."[78]

To meet the first prong of the test, the employer must show that it "took reasonable measures to educate its employees on proper conduct (prevention) and to monitor its workplace to address complaints by its employees (correction)."[79] The Court did not give employers specific direction regarding prong two, but the Court stated that an employer would normally satisfy the second element by showing that an employee failed to use "any complaint procedure provided by the employer."[80]

B. The Proper Test Today for HWE Claims

These landmark cases make it possible to formulate a comprehensive test for Title VII sexual harassment claims. Although there are several different analyses used by the U.S. circuit courts,[81] most courts (including five circuit courts)[82] use a test similar to the one established in *Henson v. City of Dundee*.[83] The *Henson* elements require the plaintiff to establish that

> (1) the employee belongs to a protected group; (2) the employee was subject to unwelcome sexual . . . harassment; (3) the harassment complained of was based on employee's sex . . . ; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) existence of employer liability.[84]

The fourth element incorporates the objective and subjective requirement from *Harris*. In other words, the fourth element requires that the harassment be sufficiently severe or pervasive, both objectively and subjectively, to have altered a term, condition, or privilege of employment.[85] Since *Oncale*, it is also necessary to examine the social context of the workplace when determining whether the objective aspect of the severe and pervasive element is met.[86] Additionally, the fifth element incorporates the affirmative defense set forth in *Faragher*[87] and *Ellerth*.[88]

Today, the proper test requires a court to determine whether, under the totality of the circumstances (including the social context), a plaintiff has demonstrated that she suffered unwelcome harassment that was "sufficiently

---

78. *Id.*

79. Lyons, *supra* note 14, at 476.

80. *Ellerth*, 524 U.S. at 765.

81. *See* Debra S. Katz, *Harassment in the Workplace*, SM097 A.L.I.-A.B.A. 121, 134-36 (2007) (describing the different tests used by the circuit courts).

82. Specifically, the Third, Fourth, Sixth, Ninth, and Eleventh Circuits. *Id.* at 133.

83. 682 F.2d 897 (11th Cir. 1982).

84. Katz, *supra* note 81, at 133.

85. *See* McGinley, *supra* note 70, at 101.

86. Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 81 (1998); *accord* McGinley, *supra* note 70, at 101.

87. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

88. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

severe or pervasive by objective and subjective measures to alter the terms or conditions of employment."[89]

C. Employer Liability for Acts of Non-employees

Each of the preceding Supreme Court cases dealt with discriminatory conduct by supervisors or co-workers. The Supreme Court has never explicitly held that employers are liable for HWEs created by non-employees.[90] However, the EEOC guidelines state that "[a]n employer may . . . be responsible for the acts of non-employees . . . where the employer . . . knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[91] The non-employees responsible for creating a HWE are often customers or clients,[92] but have also been patients[93] or students.[94] In the overwhelming majority of jurisdictions, courts have adhered to the EEOC guidelines[95] and have allowed HWE sexual harassment claims based on the conduct of non-employees.[96]

Because the Supreme Court has not officially recognized HWE claims based on the acts of non-employees, the Court has also not addressed an affirmative defense to such claims.[97] The affirmative defense established in *Faragher* and *Ellerth* only applied to HWEs created by the conduct of the plaintiff's

---

89. McGinley, *supra* note 70, at 101.

90. *See generally* Tetreault, *supra* note 4. Tetreault's annotation, which lists all of the "federal cases which considered whether an employer may be held liable for the sexually harassing acts of nonemployees," does not list any Supreme Court cases that address the issue. Additionally, not a single case that addresses employer liability for the acts of non-employees cites to authority from the Supreme Court.

91. 29 C.F.R. § 1604.11(e) (2008).

92. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1067 (10th Cir. 1998); Oliver v. Sheraton Tunica Corp., No. CIV. A. 398CV203-D-A, 2000 WL 303444, at *1 (N.D. Miss. Mar. 8, 2000).

93. *See, e.g.*, Crist v. Focus Homes, Inc., 122 F.3d 1107, 1108 (8th Cir. 1997).

94. *See, e.g.*, Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109 (ARR), 2001 WL 1328921, at *1 (E.D.N.Y. Aug. 6, 2001).

95. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986). The EEOC guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Id.* at 65 (quoting General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976)).

96. *See generally* Tetreault, *supra* note 4; *see also* Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ., 491 F. Supp. 2d 467, 476-77 (D. Del. 2007) (noting that four circuit courts have followed the EEOC guidelines and citing approximately twenty decisions holding that employers face liability for the harassing conduct of non-employees). *But cf.* Ulmer v. Bob Watson Chevrolet, Inc., No. 97 C 7460, 1999 WL 1101332 (N.D. Ill. Nov. 29, 1999) (denying a HWE sexual harassment claim because the alleged harasser was not employed by the defendant).

97. The Supreme Court does not need to determine whether an affirmative defense to a claim exists when it has not recognized the claim itself.

supervisor(s).[98] It would, however, "appear reasonable . . . to expect that an employer's affirmative defense in a nonemployee situation might be similarly altered."[99] Once again, most courts follow the EEOC Guidelines and impose liability only if the employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action."[100]

II. *MONGELLI*: THE DISTRICT COURT DECISION

In January 2004, Ms. Mongelli signed a six-month employment contract for a teaching position with the Red Clay Consolidated School District.[101] Even though she had no experience teaching special education students, Mongelli was "assigned to John Dickinson High School . . . as a teacher for ninth grade special education students."[102] "Almost immediately after she began teaching . . . [she] began having problems with one of her students, JW, who was fourteen years old."[103] JW suffered from educable mental retardation as well as psychiatric problems that were not associated with the mental retardation.[104] Over the next two months, JW consistently engaged in activity that Ms. Mongelli found offensive.[105] Mongelli alleged that she repeatedly complained of JW's conduct both by filing written reports with the principal's office and by making verbal complaints to the assistant principal.[106] The written reports (called SBRs) filed by Ms. Mongelli detailed the following conduct:

> 1) *April 26, 2004*: "JW continues to use very inappropriate language. . . . As [Mongelli] leaned over to help a student who was seated, JW got out of his seat and came up behind her. He grabbed [Mongelli] forcefully and proceeded to 'hump' her."
>
> 2) *May 3, 2004*: "When [Mongelli] was teaching the class, JW looked directly at her breasts and stated: "Your [nipples] are hard." At the end of the period, [JW] grabbed [Mongelli's] arm forcefully and pulled her close to his body. He stated, 'You're a b[it]ch, but I mean that in a good way.'"

---

98. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

99. Tetreault, *supra* note 4, § 2[b].

100. 29 C.F.R. § 1604.11(e) (2008).

101. *Mongelli*, 491 F. Supp. 2d at 471.

102. *Id.*

103. *Id.*

104. Telephone Interview with Joseph Bernstein, Attorney for Ms. Mongelli (Jan. 11, 2008).

105. *Mongelli*, 491 F. Supp. 2d at 472-73.

106. *Id.* At the outset, it is important to note that, because the court was ruling on the defendant's motion for summary judgment, it was required to "'view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion.'" *Id.* at 475 (quoting Pa. Coal Ass'n v. Babbit, 63 F.3d 231, 236 (3d. Cir. 1995)). Therefore, in this case, the court had to assume that all of Ms. Mongelli's allegations were true.

> 3) *May 4, 2004*: "At the end of the period, [JW] sat on top of the desk and stared directly at [Mongelli]. [JW] opened his legs wide and pretended to be having sex. He moved the lower portion of his body up and down quite rapidly. He said: 'Oh, oh, aah.' He made 'sucking' noises with his mouth and pretended he was breathing heavily."
>
> 4) *May 5, 2004*: "As [Mongelli] walked into the classroom . . . , [JW] grabbed her arm very forcefully and refused to let go. He said, 'Let's do the tango.' He pulled [Mongelli] close to his body and moved [her] forward. When [she] told him to let go of her arm, he said: '[You're] a b[it]ch. Chill.' Then, he stated: 'Do you have sex?' and 'Who do you have sex with?'"
>
> 5) *May 5, 2004*: "When [Mongelli] told [JW] to sit down, he threatened: 'My mom is going to take care of you. She's going to rock you.' [Mongelli] wrote out [a referral to the time out room] and gave it to JW. He yelled, 'I ain't f[uc]king going anywhere. You're a f[uc]king bitch.' He tore the form in half. [Mongelli] called the main office for an administrator. [Principal Chad] Carmack . . . came to the classroom and removed [JW]. Mr. Carmack sent [JW] back to [Mongelli's] classroom before the end of the period."
>
> 6) *May 6, 2004*: "[JW] got out of his seat, came up to [Mongelli's] desk, and stared directly at [her]. Then, [JW] sang a rap song stating, 'How's your p[uss]y?' He sang the [word] 'p[uss]y' several times during his rap song. When [Mongelli] told him to go to [the time out room], he continued singing even louder. After [JW] sang, he made 'sucking' noses with his mouth."
>
> 7) *May 7, 2004*: "[JW] got out of his seat and walked over to [Mongelli]. Then, [he] sang a rap song stating, 'Ms. Mongelli gives h[ea]d.' He sang this four times. As he was singing, [JW] pointed to his p[eni]s three times."[107]

These allegations constitute the only conduct the court considered in Mongelli's claim.[108]

Mongelli alleged that she placed each of the SBRs in the principal's mailbox "on the day it was written."[109] The school, however, did not take any disciplinary action in response to the reports until after Mongelli filed the last report on May

---

107. *Id.* at 472-73 (internal footnotes omitted).

108. The court failed to include four SBRs that concerned JW's conduct prior to April 26, 2004. The prior incidents consisted of vulgar language similar to that contained in the complaints the court did consider and did not include any physically threatening act. First Amended Complaint ¶ 15, *Mongelli*, 491 F. Supp. 2d 467 (D. Del. 2007) (No. 05-359 SLR).

109. *Mongelli*, 491 F. Supp. 2d at 473 n.10.

7.[110] On May 8, 2004, JW was "permanently removed from [Mongelli's] classroom and suspended from school for five days."[111] After a committee evaluated JW's conduct and determined that "JW's behavior was a manifestation of his disability,"[112] the assistant principal and JW's mother "mutually agreed that JW would remain home for the remainder of the school year."[113]

On May 13, 2004, Mongelli agreed to a one year teaching contract with the school.[114] Approximately one month later, as a result of the incidents Mongelli alleged, the Delaware State Police criminally charged JW with "Unlawful Sexual Contact in the Third Degree, Sexual Harassment, and two counts of Offensive Touching (all of which are misdemeanors)."[115] JW eventually entered into a plea bargain and pled guilty to "two counts of Offensive Touching and one count of Sexual Harassment."[116]

Approximately one month after JW was criminally charged, Mongelli was fired, allegedly for complications with her teaching license.[117] She then brought, inter alia, a Title VII HWE sexual harassment claim against the school district and the board of education.[118]

Ultimately, the district court denied Mongelli's claim and granted the defendant school board's motion for summary judgment.[119] However, before reaching its decision, the *Mongelli* court had to make three preliminary determinations.

A. The Mongelli *Court's Preliminary Holdings*

First, the *Mongelli* court had to determine whether employers could be held liable for a HWE created by the conduct of a non-employee.[120] The court recognized that the "emerging trend" in federal courts was to allow such claims under Title VII.[121] Because the court could find "no reason to deviate" from the trend, it held that "employers may, under certain circumstances, be held liable for

---

110. *Id.* at 474.

111. *Id.*

112. *Id.* (internal brackets and emphasis omitted).

113. *Id.* (citation omitted).

114. *Id.*

115. *Id.*

116. Plaintiff's Answering Brief in Opposition to Defendant's Motion for Summary Judgment at 6, *Mongelli*, 491 F. Supp. 2d. 467 (D. Del. 2007) (No. 05-359 SLR).

117. *Mongelli*, 491 F. Supp. 2d at 474.

118. *Id.*

119. *Id.* at 483.

120. *Id.* at 475-77. The *Mongelli* court actually framed the "first issue" as whether "a teacher . . . [could] sue the school district for which she works" based on the harassing conduct "allegedly committed by one of the teacher's students." *Id.* at 475. Answering this question required the court to first answer the question concerning employer liability for the acts of non-employees. *Id.* at 476-77.

121. *Id.* at 476. The court pointed out that the First, Eighth, Ninth, and Tenth U.S. Circuit Courts of Appeal's decisional law had followed the EEOC guidelines, which allow these claims.

sexual harassment suffered by their employees at the hands of non-employees."[122]

Second, the *Mongelli* court had to determine whether schools could be liable for a hostile work environment created by the harassing conduct of students against their teachers.[123] The court stated:

> [S]uch a scenario involves competing public interests, namely, a school's duty to protect teachers from abusive students versus its obligation to teach those students how to conduct themselves in a socially acceptable way. Unlike cases involving abusive co-workers or customers, a school district cannot easily "terminate" a student or permanently ban him from the premises; instead, the district must attempt to deal with the abusive student using the limited tools and resources at its disposal.[124]

Despite recognizing the difference between student-on-teacher harassment and non-employee HWE sexual harassment claims involving customers, the *Mongelli* court held that, generally, schools can be liable for HWE "claims under Title VII . . . [if the schools] fail to address teachers' claims of harassment by students."[125]

Finally, the court examined whether a teacher could bring a Title VII HWE claim "when the abuse is perpetrated by a special education student."[126] The court first discussed its concerns with allowing such a claim, noting that special education students are unique in that "school districts are obligated under federal law to teach [them]"[127] and they "are prone to disruptive behavior by virtue of their disabilities."[128] However, the court reasoned that prohibiting such claims would essentially "'immunize' schools from liability"[129] whenever a special education student harassed a teacher, regardless of the circumstances or the severity of the harassment.[130] Further, "[s]uch a blanket prohibition would do a disservice to teachers, who deserve a working environment free from abuse, and would provide schools with no incentive to remedy incidents of harassment in their special education classrooms."[131] Based on this reasoning, the *Mongelli* court determined that "while the requisite threshold of abuse will necessarily be higher than with students lacking developmental disabilities . . . harassment of teachers by special education students can constitute a hostile work environment for Title VII purposes."[132] In sum, the court held that Mongelli could bring a Title VII HWE sexual harassment claim against the school based on JW's conduct.

---

122. *Id.* at 477.
123. *Id.*
124. *Id.*
125. *Id.* at 478.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*

B. The Mongelli *Court Denies Mongelli's Claim*

After clearing the path for Mongelli to bring her Title VII HWE claim, the court immediately proceeded to shoot it down. According to the court, Mongelli's claim failed for two reasons.[133]

First, the "severity of the conduct and the context in which it took place [were] not sufficient to satisfy Title VII's 'severe or pervasive' requirement."[134] In making this determination, the court should have considered "'all the relevant circumstances surrounding the discriminatory conduct.'"[135] However, the court only considered the "short period of time" over which the incidents occurred and that the school eventually removed JW from the plaintiff's classroom.[136]

Second, the court found that "[e]ven if JW's conduct were deemed to satisfy the 'severe or pervasive' requirement . . . [Mongelli] has failed to establish that a reasonable person in her situation would have been detrimentally affected by the objectionable conduct."[137] According to the court, the record was insufficient to show where "the tolerance threshold of a reasonable special education teacher lies."[138] In other words, the record failed to show what conduct a reasonable special education teacher would find hostile enough to alter the terms or conditions of employment.[139]

Based on these findings, the *Mongelli* court granted the School Board's motion for summary judgment.[140]

III. ANALYSIS OF THE *MONGELLI* DECISION

The *Mongelli* court was correct in each of its three preliminary holdings. In addition, the court was probably correct in its decision to grant summary judgment for the defendant school board.[141]

A. The Mongelli *Court's Preliminary Holdings Are Valid*

The *Mongelli* court's preliminary holdings are valid because they are consistent with existing case law.

1. Employers May Be Held Liable for HWE's Created by the Conduct of Non-employees.—As discussed in Part I.C, the overwhelming majority of courts

---

133. *Id.* at 480-81.

134. *Id.* at 480.

135. *Id.* (quoting Arasteh v. MBNA Am. Bank, N.A., 146 F. Supp. 2d 476, 494-95 (D. Del 2001)).

136. *Id.*

137. *Id.*

138. *Id.* at 481.

139. *Id.*

140. *Id.*

141. This will, unfortunately, never be decided by an appellate court. Although Mongelli filed an appeal, the case was later settled in mediation for an undisclosed amount. Telephone Interview with Joseph Bernstein, Attorney for Ms. Mongelli (Jan. 11, 2008).

have held that, in certain situations, Title VII imposes liability upon employers for the harassing acts of non-employees.[142] The court in *Mongelli* decided that there was "no reason to deviate from this trend."[143] Even though the Supreme Court has not explicitly held that Title VII imposes liability in these situations,[144] in the absence of the Court's direction to hold otherwise, the *Mongelli* court was correct in following the current weight of authority.

2. Title VII Imposes Liability on Schools for HWEs Created by Student-on-Teacher Harassment.—Few courts have confronted the issue of school liability under Title VII for student-on-teacher harassment.[145] The Supreme Court has yet to address the issue[146] and scholarly commentary is noticeably lacking.[147] However, the few courts that have addressed the issue have unanimously found that Title VII imposes liability on schools for student-on-teacher harassment.[148]

The court in *Plaza-Torres v. Rey*[149] recognized that the issue had never been expressly resolved,[150] but held that "student-on-teacher sexual harassment may be inferred from recent Title VII [and] Equal Protection . . . case law."[151] The *Rey* court relied on two equal protection cases, *Schroeder v. Hamilton School District*[152] and *Lovell v. Comsewogue School District*,[153] and a Title VII case, *Peries v. New York City Board of Education*.[154]

Both *Schroeder* and *Lovell* involved students harassing a teacher based on the teacher's sexual orientation.[155] However, these claims were structured as Equal Protection claims because Title VII does not "provide for a private right of action based on sexual orientation discrimination."[156] The courts in both *Schroeder* and *Lovell* held that plaintiffs could bring Equal Protection claims

---

142. *See supra* notes 92-96 and accompanying text.

143. *Mongelli*, 491 F. Supp. 2d at 477.

144. *See supra* note 90 and accompanying text.

145. *See* Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 181 (D.P.R. 2005) (noting that only a "handful of cases" dealt with student-on-teacher harassment).

146. *Id.* at 180.

147. The research for this Note produced a good deal of scholarly work focusing on teacher-on-student harassment or student-on-student harassment, but none concerning student-on-teacher harassment.

148. *See Rey*, 376 F. Supp. 2d at 180; Peries v. New York City Bd. of Educ., No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001); *accord* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002); Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319, 322 (E.D.N.Y. 2002).

149. 376 F. Supp. 2d 171 (D.P.R. 2005).

150. *Id.* at 180.

151. *Id.*

152. 282 F.3d 946 (7th Cir. 2002).

153. 214 F. Supp. 2d 319 (E.D.N.Y. 2002).

154. No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

155. In both cases, a teacher alleged that students repeatedly referred to the teacher using homophobic slurs. *See Schroeder*, 282 F.3d at 948-49; *Lovell* 214 F. Supp. 2d at 321.

156. *Schroeder*, 282 F.3d at 951.

based on student-on-teacher harassment.[157] The court in *Schroeder* also stated: "Were this a Title VII case, the defendants could be liable to [the plaintiff] if he demonstrated that they knew he was being harassed and failed to take reasonable measures to try to prevent it."[158]

Finally, the court in *Peries*, a Title VII case based on student-on-teacher racial harassment, determined that schools should be held to the same standard that employers are held to in cases involving the harassing conduct of non-employees.[159] Therefore, according to the *Peries* court, schools could be held liable for HWEs created by student conduct.[160]

Although the *Rey* court recognized that these three cases were only persuasive authority, it concluded that "absent clear directive from the U.S. Supreme Court . . . we will not limit the reach of Title VII liability by closing the door on student-on-teacher harassment. After all, Title VII seeks to eliminate all forms of sex discrimination in all work environments."[161]

The *Mongelli* court's opinion is consistent with *Rey* and the cases on which the *Rey* court relied. Thus, the *Mongelli* court's holding that Title VII imposes liability on schools for HWEs created by student-on-teacher harassment seems sound.

3. Title VII Imposes Liability on Schools for HWEs Created by the Harassing Conduct of Special Education Students.—Courts have consistently held that Title VII imposes liability for the harassing conduct of *mentally challenged* non-employees.[162]

For example, in *Crist v. Focus Homes Inc.*,[163] three female plaintiffs[164] were employed by Focus Homes, an organization that ran homes for individuals with developmental disabilities.[165] Focus Homes opened a new facility and hired the plaintiffs for the positions of manager, assistant manager, and lead program

---

157. Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 182 (D.P.R. 2005).

158. *Schroeder*, 282 F.3d at 951.

159. *Peries*, 2001 WL 1328921 at *6.

160. *Id.*

161. *Rey*, 376 F. Supp. 2d at 182.

162. *See* Crist v. Focus Homes, Inc., 122 F.3d 1107, 1108 (8th Cir. 1997) (allowing Title VII claim based on conduct of severely impaired patient); Van Horn v. Specialized Support Services, Inc., 241 F. Supp. 2d 994, 1012-13 (S.D. Iowa 2003) (finding actionable a claim based on conduct of patient with Down syndrome); *Peries*, 2001 WL 1328921, at *6-7 (allowing claim where special education students harassed teacher because of his ethnicity); McGuire v. Virginia, 988 F. Supp. 980, 988 (W.D. Va. 1997) (allowing claim where incompetent adult son of board member repeatedly harassed a secretary); Salazar v. Diversified Paratransit, Inc., 11 Cal. Rptr. 3d 630, 637 (Ct. App. 2004) (allowing claim where developmentally disabled bus passenger repeatedly assaulted the bus driver).

163. 122 F.3d 1107 (8th Cir. 1997).

164. *Id.* at 1108. The individual plaintiffs were Crist, Miskowic, and Elbers.

165. *Id.*

staff.[166] Throughout a four month span, a severely impaired patient (J.L.)[167] repeatedly abused the plaintiffs, both physically and sexually.[168] For example, "over thirteen reports involved J.L.'s grabbing of the [plaintiffs'] breasts, buttocks, or genital areas."[169] Other incidents included J.L. openly masturbating and exposing himself to the plaintiffs.[170]

Despite these egregious incidents, the district court granted *the defendant's* motion for summary judgment.[171] The district court found that because of the patient's severe impairments, "his conduct could not constitute sexual harassment."[172] Further, the district court determined that even if J.L.'s conduct did constitute sexual harassment, "Focus Homes could not be held responsible for his behavior because it could not control the behavior."[173]

The Eighth Circuit reversed because the district court wrongly focused on the patient's intent.[174] The court stated that "the actor who engages in physical conduct need not have the intent to create an abusive working environment. Rather, the focus of sexual harassment cases is primarily on the effect of the conduct."[175] Similarly, in the educational setting, courts should not focus on the ability of a special education student to form intent, but rather on the effect of the student's conduct.

Peries v. New York City Board of Education[176] is the only case beside *Mongelli* that specifically addressed whether schools may be held liable when special education students harass a teacher. In *Peries*, a special education teacher alleged that throughout a five year span, special education students repeatedly directed racist remarks at him.[177] The court recognized that the case was unusual because the harassment came from students,[178] but determined that the school could be held liable.[179] The *Peries* court reached its conclusion by focusing on the control the school had over the students rather than on the students' intent.[180]

As with the first two preliminary holdings, the *Mongelli* court's holding that

---

166. *Id.*

167. J.L. was only sixteen years old, but he was over six feet tall and weighed over two hundred pounds. *Id.* Despite his size, he only "functioned at the level of a two-to-five-year-old." *Id.*

168. *Id.*

169. *Id.* at 1109.

170. *Id.*

171. *Id.* at 1110.

172. *Id.*

173. *Id.*

174. *Id.* at 1110-11.

175. *Id.* at 1111.

176. No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

177. The students regularly taunted Peries, calling him names such as "fucking Hindu" and "Indian Shit." *Id.* at *1-2.

178. *Id.* at *5.

179. *Id.* at *6.

180. *Id.*

Title VII imposes liability on schools for the harassing conduct of special education students is correct because it is consistent with existing case law.

B. The Mongelli *Court's Grant of Summary Judgment Was Probably Correct*

Part I.B of this Note determined that the proper Title VII test was whether, under the totality of the circumstances, a plaintiff demonstrated that she suffered unwelcome harassment that was "sufficiently severe or pervasive by objective and subjective measures to alter"[181] the terms, conditions, or privileges of employment, keeping in mind the social context of the workplace.[182]

The *Mongelli* court determined that Mongelli did not meet the objective requirement because she "failed to establish that a reasonable person in her situation would have been detrimentally affected."[183] To analyze whether the *Mongelli* court correctly decided that the objective element was not met, this section describes a theoretical test that determines whether the terms or conditions of employment were altered.[184] It then examines existing case law to determine whether the *Mongelli* decision is consistent with decisions that have addressed similar issues.

1. The Terms and Conditions Approach.—In her article, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*,[185] Ann McGinley noted that the Title VII test requires the trier of fact to first determine the terms, conditions, or privileges of employment.[186] McGinley formulated a three question test "[t]o determine whether particular behavior constitutes a term or condition of employment."[187] The three questions are:

> 1) whether the behavior in question is necessary to the particular job performed by the employee; 2) whether it relates to the essence of the business in which the job is performed; and 3) whether the employer communicated to the employee, either implicitly or explicitly, that this behavior constituted part of the employee's job.[188]

---

181. McGinley, *supra* note 70, at 101.

182. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

183. Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ., 491 F. Supp. 2d 467, 480 (D. Del. 2007).

184. McGinley, *supra* note 70, at 101.

185. *Id.*

186. *Id.* at 102. McGinley's article focuses on women in sexualized professions, including exotic dancers and prostitutes (in legal brothels). Despite the difference in professions, the Title VII analysis remains the same. McGinley is concerned with the range of conduct exotic dancers must endure. Similarly, this Note examines the range of conduct special education teachers must endure.

187. *Id.*

188. *Id.* The three questions in McGinley's test basically ask the same thing: should the employee have expected the harassing conduct? If a behavior is necessary to the particular job being performed, the employee may reasonably expect that she will be required to endure that behavior. Similarly, if the employer explicitly informs the employee that the behavior is part of the

If the answer to all three questions is yes, then the behavior at issue is a term or condition of employment.[189] If the court answers yes to all three questions, the behavior in question cannot create a HWE because, by definition, a behavior that is a term or condition of employment cannot alter a term or condition of employment.[190] After the three question test determines the terms or conditions of employment, the trier of fact must then decide whether these terms or conditions were altered by the harassing conduct.[191]

To illustrate, McGinley uses the example of exotic dancers. She explains that "a term or condition of employment for exotic dancers in gentlemen's clubs may require tolerating hooting and staring."[192] Thus, for an exotic dancer, "being asked to endure hooting and staring would not alter the terms or conditions of employment, because tolerating this behavior is [already] a term or condition of employment."[193]

Applying this test to Mongelli's case, the pertinent questions are whether enduring JW's conduct was necessary to teaching a ninth grade special education class, and whether the school board informed Mongelli that enduring this sort of behavior was part of her job.

2. Relevant Case Law.—The *Mongelli* court held that the threshold of abuse in Title VII claims was necessarily higher for special education teachers.[194] Therefore, the most helpful cases to determine whether *Mongelli* was decided correctly examine workplace environments where employees might be expected to tolerate some severe conduct. These cases can be separated into two categories: (1) the employee was regularly exposed to crude situations in the workplace, or (2) the employee knew that the harasser suffered from a condition that made the harasser more prone to engage in harassing conduct.

a. Employees regularly exposed to crude behavior in the workplace.—In *Gross v. Burggraf Construction Co.*,[195] the plaintiff, a female truck driver for a construction company, complained that her supervisor referred to her using derogatory terms and constantly used profanity.[196] The court in *Gross* stated that the proper Title VII sexual harassment test is contextual and changes "depending

---

job, then the employee will expect the behavior.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ., 491 F. Supp. 2d 467, 478 (D. Del. 2007).

195. 53 F.3d 1531 (10th Cir. 1995).

196. *Id.* at 1536. Gross alleged that, on one occasion, her supervisor referred to her as a "cunt," and that on another, he stated to a co-worker, "Mark, sometimes don't you just want to smash a woman in the face?" *Id.* However, the court found that the evidence concerning the use of "cunt" was inadmissible. *Id.* at 1541.

upon the work environment"[197] in which the conduct occurred.[198] The court recognized that "[i]n the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive."[199] The court instead viewed profanity as a normal and accepted form of expression.[200] According to the court, because construction workers must expect crude language in the workplace, the supervisor's vulgar comments were insufficient to create a HWE.[201]

In *Coolidge v. Consolidated City of Indianapolis*,[202] the court was confronted with a peculiar factual scenario. The plaintiff, Coolidge, worked in a forensic crime lab.[203] Coolidge's former supervisor, who had been fired for sexually harassing Coolidge,[204] allegedly left two videotapes that contained pornography depicting necrophilia and other "disturbing images" where he knew Coolidge would find them.[205] Coolidge found the tapes and became nauseous after viewing their content.[206] The court held that the videotapes did not create a HWE because the "encounter was brief and not particularly severe."[207] In its analysis of the tapes' severity, the court stated, "Crime Lab employees frequently worked with corpses, so pornography depicting necrophilia might not have the same shocking overtones there as it would in another setting."[208] Thus, although the facts were markedly different, in both *Coolidge* and *Gross*, the courts found that offensive conduct did not alter the terms or conditions of employment where the plaintiffs were regularly exposed to similar behavior in the course of their work.

Gross and *Coolidge* illustrate a deficiency in McGinley's three question terms and conditions test.[209] McGinley's test fails to account for behaviors that, although not necessary for the particular job or business involved, are common in certain workplace environments. For example, in *Gross*, the court did not find that enduring profane language was necessary to performing the job of a truck driver.[210] The *Gross* court also did not find that profanity or vulgarity related to the essence of either construction work or truck driving.[211] Rather, the *Gross* court merely found that profanity was a normal behavior in the construction

---

197. *Id.* at 1538.

198. This is consistent with *Oncale*, which requires courts to examine the social context in which conduct takes place. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

199. *Gross*, 53 F.3d at 1537.

200. *Id.*

201. *Id.* at 1547.

202. 505 F.3d 731 (7th Cir. 2007).

203. *Id.* at 732-33.

204. *Id.* at 733.

205. *Id.*

206. *Id.*

207. *Id.* at 734.

208. *Id.*

209. *See* McGinley, *supra* note 70, at 102.

210. Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995).

211. *Id.* at 1537-38.

industry.[212] Similarly, the *Coolidge* court did not find that enduring pornographic materials depicting necrophilia was necessary to a forensic scientist's job.[213] Thus, it would be appropriate to add an inquiry to McGinley's test: is a behavior so common in a workplace that exposure to such behavior would not sufficiently alter the terms or conditions of employment? If so, then exposure to such a behavior would not create a HWE.

b. Employee is aware that individual is prone to harassing conduct.—The cases in this category involve plaintiffs who were allegedly harassed by mentally or psychiatrically impaired individuals. In each case, the court determined that a Title VII claim could theoretically be brought. The courts, however, differed on whether summary judgment was appropriate.

(i) Plaintiff's claim survived summary judgment.—In *Peries v. New York City Board of Education*,[214] discussed in Part III.A.3., the court allowed a special education teacher's Title VII HWE racial harassment claim to survive summary judgment even though the alleged conduct came from special education students.[215] The court found that five years of "ongoing name-calling, mimicking, and other abuse" could have been "sufficiently severe or pervasive to alter the conditions" or terms of employment.[216]

Similarly, in *Crist v. Focus Homes Inc.*,[217] also discussed in Part III.A.3, the court allowed the plaintiffs' claims even though the alleged harasser was severely mentally impaired.[218] Recall that in *Crist* the patient repeatedly grabbed the employees' genital areas and masturbated in front of the employees.[219] The court in *Crist* recognized that whether J.L.'s conduct was hostile or abusive "require[d] particularized consideration of the circumstances, including . . . the [plaintiffs'] expectations given their choice of employment."[220] However, because of "factual disputes in the record,"[221] the court found that whether J.L.'s conduct was abusive, under the circumstances, was an issue for a jury after a full trial.[222]

Finally, in *Salazar v. Diversified Paratransit, Inc.*,[223] the plaintiff, a bus driver for a company that transported developmentally disabled individuals, brought a Title VII HWE sexual harassment claim after a passenger with Down syndrome harassed her on several occasions and exposed his genitals to Salazar

---

212. *Id.*

213. *Coolidge*, 505 F.3d at 734.

214. Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109 (ARR), 2001 WL 1328921 (E.D.N.Y. Aug. 6, 2001).

215. *Id.* at *6-7.

216. *Id.* at *6.

217. 122 F.3d 1107 (8th Cir. 1997).

218. *Id.* at 1111.

219. *Id.* at 1109.

220. *Id.* at 1111.

221. *Id.*

222. *Id.*

223. 11 Cal. Rptr. 3d 630 (Ct. App. 2004).

twice.[224] The second exposure incident culminated when the passenger attacked Salazar, attempting to touch "her all over and . . . put his hands under her shirt and shorts."[225] The *Salazar* court held that a jury should have determined the case.[226]

(ii) Plaintiff's claim did not survive summary judgment.—The court in *Van Horn v. Specialized Support Services, Inc.*[227] found that the plaintiff's HWE claim failed because she could not establish the objective part of the severe or pervasive test.[228] The plaintiff worked for a company that provided care for "mentally retarded and developmentally disabled clients."[229] She specifically worked with KB, a twenty-one year old male with Down syndrome.[230] During the span of one month, KB touched Ms. Van Horn inappropriately on three separate occasions.[231] In the first incident, KB briefly touched Ms. Van Horn's breasts.[232] In the second, he pinched her inner thigh.[233] In the third, KB pinched Ms. Van Horn's breast near the nipple.[234] KB also made a few sexually suggestive comments, the worst of which was "Betty wears pantyhose, I could take them off her, ooooh."[235] Despite the three physical incidents, the *Van Horn* court found that the plaintiff's HWE claim failed because she did not sufficiently establish the objective part of the severe or pervasive test.[236] The court emphasized that the alleged conduct "took place over a period of less than one month,"[237] most of the conduct was mere utterances and not physically threatening or humiliating,[238] and of the three physical incidents only the last (breast pinching) was objectively severe.[239]

---

224. *Id.* at 633-34.

225. *Id.* at 634.

226. *Id.* at 637-38. In *Salazar*, the case was initially tried to a jury, but at the "conclusion of Salazar's case, the trial court granted nonsuit in favor of the defendants" on the grounds that employers were not liable for the acts of a client or customer. *Id.* at 634. The California Court of Appeals upheld the nonsuit. *Id.* However, the California legislature subsequently passed a bill to abrogate the appellate court's decision. *Id.* At the direction of the California Supreme Court, the court of appeals reexamined the case in light of the new legislation. *Id.* at 635. Upon reexamination, the *Salazar* court determined that the trial court's grant of nonsuit in favor of defendants was no longer proper. *Id.* at 637-38.

227. 241 F. Supp. 2d 994 (S.D. Iowa 2003).

228. *Id.* at 1008-09.

229. *Id.* at 998.

230. *Id.* at 999.

231. *Id.* at 1000-04.

232. *Id.* at 1000.

233. *Id.* at 1002.

234. *Id.* at 1004.

235. *Id.* at 1004.

236. *Id.* at 1008-09.

237. *Id.* at 1009.

238. *Id.* at 1008.

239. *Id.*

3. The Mongelli *Court's Grant of Summary Judgment Is Defensible.*—The *Mongelli* court's grant of summary judgment is defensible because it is consistent with the case law previously discussed.

The factual scenario in *Mongelli*[240] most closely resembles the factual scenario from *Van Horn*.[241] In both cases, the alleged harassment took place in the span of less than one month, consisted mostly of offensive utterances, and did not consist of incidents that were overly physically threatening or humiliating. The *Van Horn* court found that the objective test was not met because the incidents occurred over a short period of time and only one incident was objectively hostile or abusive.[242] Similarly, in *Mongelli*, the incidents occurred over a short period of time and probably only one incident (JW humping Mongelli) was objectively severe.[243]

Although the majority of cases discussed *allowed* Title VII claims based on the conduct of mentally impaired non-employees, the cases that survived summary judgment involved harassment that was either inherently more severe[244] than JW's conduct or much more frequent than JW's conduct.[245] For example, the patient in *Crist* grabbed the plaintiffs' genital areas and repeatedly masturbated in front of the plaintiffs.[246] The harassment in *Peries*, although not physically threatening, occurred repeatedly for five years.[247] JW's conduct was not inherently severe and only occurred over a two week span.[248] Thus, as with the patient's conduct in *Van Horn*, JW's conduct "did not rise to the level of the conduct"[249] present in the cases that survived summary judgment.

This conclusion is somewhat dissatisfying because Title VII "seeks to eliminate all forms of sex discrimination in all work environments."[250] Further, it would seem that conduct severe enough to incur criminal charges would be sufficiently severe for the purposes of Title VII. However, as the *Harris* court noted, the objectively severe and pervasive test is, "by its nature," mathematically imprecise.[251] JW's conduct was probably severe enough that another court may have ruled differently. However, given the social context of

---

240. Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ., 491 F. Supp. 2d 467 (D. Del. 2007).

241. Van Horn v. Specialized Support Servs., Inc., 241 F. Supp. 2d 994 (S.D. Iowa 2003).

242. *Id.* at 1008.

243. *See Mongelli*, 491 F. Supp. 2d at 480. Furthermore, JW humping Mongelli is probably not as severe as KB pinching the plaintiff's breast in *Van Horn*.

244. *See, e.g.*, Crist v. Focus Homes, Inc., 122 F.3d 1107, 1108-10 (8th Cir. 1997).

245. *See, e.g.*, Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109 (ARR), 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001).

246. *Crist*, 122 F.3d at 1109.

247. *Peries*, 2001 WL 1328921 at *1-2.

248. *Mongelli*, 491 F. Supp. 2d at 472-73.

249. Van Horn v. Specialized Support Servs., Inc., 241 F. Supp. 2d 994, 1009 (S.D. Iowa 2003).

250. Plaza-Torres v. Rey, 376 F. Supp. 2d 171, 182 (D.P.R. 2005).

251. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

the special education classroom, and in light of the *Van Horn* decision, the *Mongelli* court's grant of summary judgment is defensible.

IV. SUGGESTIONS FOR THE FUTURE

Despite the lack of explicit instruction from the Supreme Court,[252] the early case law indicates that teachers will be allowed to bring HWE claims based on the conduct of mentally impaired students.[253] It also appears that schools will be allowed to use the *Faragher* affirmative defense against these claims.[254] Therefore, although the conduct in *Mongelli* was not sufficient to establish a HWE, it is important for schools to be aware of the potential for liability and the need to implement procedures to avoid it.

A. Suggestions for Schools

Because liability in HWE sexual harassment claims results when harassing conduct creates a HWE and the employer fails to take remedial action,[255] schools should put programs in place to prevent harassment and to remedy any harassment that occurs.[256]

1. Preventive Measures.—The "primary objective"[257] of Title VII is to prevent harassment.[258] The EEOC Guidelines stress that "[p]revention is the best tool for the elimination of sexual harassment."[259] The Supreme Court recognized that Title VII's preventive goals warranted an affirmative defense for employers that "exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[260] As one commentator noted, the Supreme Court's message is clear: "To avoid going to trial and losing a Title VII sexual

---

252. *See Rey*, 376 F. Supp. 2d at 180 (U.S. Supreme Court has not addressed "school liability for sexual harassment suffered by a teacher on account of a student.").

253. *See* discussion *supra* Part III.A.3.

254. *See* Peries v. N.Y. City Bd. of Educ., No. 97 CV 7109 (ARR), 2001 WL 1328921, at *6 (E.D.N.Y. Aug. 6, 2001) (stating that a teacher could prevail in his claim based on student harassment only if he could show "that the school board either provided no reasonable avenue of complaint or knew of the harassment and failed to take appropriate remedial action").

255. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1071-72 (10th Cir. 1998). In *Lockard*, the defendants had a sexual harassment policy in place that every employee was required to read. However, when male customers harassed a female employee, the manager did not take remedial action. As a result, the owner of the restaurant was held liable for the conduct of the non-employees. *Id.* at 1074-75.

256. Lyons, *supra* note 14, at 476.

257. Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998).

258. *Id.*; *accord* Sean Obermeyer, Note, *Resolving the Catch 22: Franchisor Vicarious Liability for Employee Sexual Harassment Claims Against Franchisees*, 40 IND. L. REV 611, 636 (2007) (noting that Title VII's focus on prevention is correct because of the staggering costs of sexual harassment in the workplace).

259. 29 C.F.R. § 1604.11(f) (2008).

260. *Faragher*, 524 U.S. at 807.

harassment suit, employers must take preventative measures.[261] According to the EEOC,

> An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under [T]itle VII, and developing methods to sensitize all concerned.[262]

Therefore, schools should implement programs aimed at educating teachers about student harassment.[263] These programs should, at a minimum, alert teachers to the types of behaviors the school does not consider harassment. The school should also design specific and clear procedures that teachers use to register complaints concerning student conduct.[264]

2. Remedial Action.—A school district's remedial action plan should be designed so that the employee responsible for receiving teachers' complaints is also the employee responsible for taking remedial action. This design minimizes the risk that a lack of communication will result in school liability. For example, suppose a school district's policy concerning teachers' complaints is structured in the following manner:

(1) All teachers shall file complaints of harassing conduct with the assistant principal.
(2) The assistant principal shall relay all harassment complaints to the head principal.
(3) The head principal shall inform the school board of complaints she deems to be significant.
(4) The school board shall take remedial action as it deems appropriate.

In this scenario, the school can be held liable in one of three ways. First, the assistant principal may fail to inform the principal of a complaint (and thus no action would be taken). Second, the principal might not inform the school board of a complaint, either out of carelessness, or because she determines that the complaint is minor in nature. Finally, the school board may fail to take action when it should have. This scenario may to lead to a devastating lack of communication—either from the assistant principal to the principal, or from the principal to the school board.

On the other hand, if the employee who receives the complaints is also the individual responsible for taking remedial action, there is no chance that a lack in communication between employees will impose liability on the school. To

---

261. Lyons, *supra* note 14, at 489.

262. 29 C.F.R. § 1604.11(f) (2008).

263. *See* Lyons, *supra* note 14, at 476.

264. It is important for schools to establish clear complaint procedures so that the school can raise an affirmative defense in cases where a teacher fails to take advantage of the complaint procedures. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

illustrate, suppose instead that the school district's policy states:

(1) All teachers shall file complaints of harassing conduct with the principal.
(2) The principal shall take immediate action to remedy the situation.
(3) The principal shall notify the board of any and all complaints as well as the action taken to remedy the situation.

This scenario corrects the communication problems presented in the previous example. Because the principal is responsible for receiving the complaints and taking remedial action, the potential for error is limited to an error in the principal's discretion.

B. Suggestions for Courts

Courts should take teachers' claims of student-on-teacher sexual harassment seriously. Early court decisions extended Title VII to cover student-on-teacher harassment.[265] Therefore, a court should deny a school board's motion for summary judgment if a teacher can demonstrate that she suffered unwelcome harassment that was "sufficiently severe or pervasive by objective and subjective measures to alter"[266] the terms, conditions, or privileges of employment. As in any other Title VII case, this demands examination of both the subjective and objective severity of behavior[267] and the social context in which the behavior occurred.[268]

CONCLUSION

The title of this Note questions whether special education teachers waive their right to be free from sexual harassment from students. Case law directly related to the topic is sparse, but the early decisions indicate that teachers may bring Title VII HWE sexual harassment claims against schools that know (or should have known) about students harassing teachers and did nothing to remedy the situation.[269] Although special education teachers may be required to expect a heightened degree of abuse from their students,[270] they should not completely forfeit their right to work in an environment free of sexual harassment.[271]

---

265. *See* discussion *supra* Part III.A.2.

266. McGinley, *supra* note 70, at 101.

267. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

268. Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998).

269. *See* discussion *supra* Part III.A.2-3.

270. *See* Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Educ., 491 F. Supp. 2d 467, 478 (D. Del. 2007).

271. *See id.* (teachers deserve a working environment free from abuse).

THE PROBLEMATIC APPLICATION OF TITLE VII'S LIMITATIONS PERIOD IN THE PAY DISCRIMINATION CONTEXT: *LEDBETTER V. GOODYEAR*, THE LEDBETTER FAIR PAY ACT, AND AN ARGUMENT FOR A MODIFIED BALANCING TEST

JONATHON WRIGHT*

INTRODUCTION

The United States Supreme Court has decided several pay discrimination cases throughout the past four decades.[1] However, due to the unique nature of compensation decisions, courts have struggled to consistently apply Title VII's limitation period[2] to disparate-treatment pay cases.[3] Specifically, courts

---

* J.D. Candidate, 2010, Indiana University School of Law—Indianapolis. M.B.A. Candidate, 2010, Kelley School of Business—Indianapolis. B.S., 2005, Kelley School of Business—Indianapolis. Recipient of the Papke Prize for Best Note in Volume 42, endowed by and named in honor of David R. Papke, former R. Bruce Townsend Professor of Law and faculty advisor to the Indiana Law Review.

1. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).; Bazemore v. Friday, 478 U.S. 385 (1986); Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977).

2. Title VII defines a timely charge in the following manner:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000e-5(e)(1) (2006). Accordingly, in so-called deferral states, which have relevant state or local laws giving state agencies primary jurisdiction in Title VII discrimination claims, the applicable charge must be brought within 300 days of the unlawful act to be timely. *Id.* In non-deferral states, where there is no relevant state or local agency, to be timely, the applicable charge must be brought within 180 days. *Id.*

3. *See Ledbetter*, 550 U.S. at 623 (case citations omitted) (noting the split regarding the proper application of the limitations period in Title VII disparate-treatment pay cases among the lower courts).

have disagreed about exactly which activity constitutes the unlawful employment action in the context of compensation decisions.[4] Some courts identified both the pay-setting decision and the actual payment of the discriminatory wage as actionable employment actions.[5] Others recognized only the pay-setting decision as the unlawful employment action and viewed the payment of discriminatory wages merely as an effect of past discrimination.[6]

On May 29, 2007, the United States Supreme Court determined that pay decisions alone are the unlawful employment practices in disparate-treatment pay cases.[7] In so holding, the Court reasoned that the actual payment of the discriminatory wage was merely an adverse effect of the previous pay-setting decision: "A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination."[8] In other words, Title VII plaintiffs must focus on intentional pay decisions during the charge filing period for their pay discrimination claim to be timely.[9]

Just weeks after the Supreme Court's *Ledbetter* decision, Representative George Miller (Democrat—California) introduced the Lilly Ledbetter Fair Pay Act of 2007 (the Bill)[10] in the House of Representatives.[11] Although this particular Bill ultimately failed a cloture motion in the Senate,[12] President Obama

---

4. Title VII makes it unlawful for an employer to "discriminate against any individual with respect to [the individual's] compensation . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006).

5. *See, e.g.*, Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (holding that both the decision to implement a discriminatory pay scale and payments made in accordance with such a scale may be the basis for pay discrimination causes of action under Title VII), *abrogated by Ledbetter*, 550 U.S. 618.

6. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1182-83 (11th Cir. 2005) (finding Title VII plaintiffs may not base pay discrimination claims on pay decisions occurring before the last pay decision affecting the plaintiff's pay during the limitations period), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

7. *Ledbetter*, 550 U.S. at 628-29.

8. *Id.* at 628.

9. *Id.* Note, however, this framework does not apply to facially-discriminatory pay structures. Such pay schemes are controlled by *Bazemore v. Friday*, 478 U.S. 385 (1986). That is, an employer who intentionally retains a facially-discriminatory pay schedule is liable as long as it continues to use the discriminatory pay scheme. *Ledbetter*, 550 U.S. at 634-35.

10. H.R. 2831, 110th Cong. (2007).

11. Govtrack.us, H.R. 2831 [110th]: Lilly Ledbetter Fair Pay Act of 2007 (Jul. 31, 2007), http://www.govtrack.us/congress/bill.xpd?bill=h110-2831 [hereinafter Govtrack.us, H.R. 2831 [110th]].

12. *See* Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22.

signed the Lilly Ledbetter Fair Pay Act of 2009 (LFPA),[13] a nearly identical version, into law on January 29, 2009.[14] The LFPA amends Title VII of the Civil Rights Act of 1964 (among other anti-discrimination statutes), effectively overturning the *Ledbetter* decision and embracing the paycheck accrual theory the Supreme Court so adamantly rejected.[15]

This Note examines the application of Title VII's limitations period in the context of pay discrimination cases. Part I briefly reviews the Supreme Court cases that provided the pre-*Ledbetter* foundation for identifying the unlawful employment practice in the pay discrimination context; it also explores the split among lower courts concerning the application of the limitations period in Title VII disparate-treatment pay cases. Part II examines the *Ledbetter* decision in detail. It explores the case's factual circumstances, Lilly Ledbetter's legal strategy, Justice Alito's majority opinion, and Justice Ginsburg's dissent. Part III describes the LFPA, evaluates its legal effects, and addresses its practical implications. Finally, Part IV examines whether current judicial doctrines are flexible enough to adequately protect victims of pay discrimination and advocates a modified balancing test for the application of Title VII's limitations period in the pay discrimination context.

I. PRE-*LEDBETTER* SUPREME COURT CASES IDENTIFYING THE RELEVANT UNLAWFUL EMPLOYMENT PRACTICES FOR THE PURPOSES OF APPLYING TITLE VII'S LIMITATIONS PERIOD TO DISPARATE-PAY CASES

The Supreme Court has ruled on the application of Title VII's limitations period in the pay discrimination context numerous times since the statute's inception.[16] The most poignant decisions of the past four decades serve as a foundation for understanding how the lower courts ultimately split in their interpretation of the limitations period in Title VII pay discrimination jurisprudence.

A. The Early Cases

1. Unfortunate Historical Events with No Legal Consequences: United Air Lines, Inc. v. Evans.[17]—Throughout the 1960s, United Air Lines, Inc. (United) maintained a policy that refused to employ married flight attendants.[18] Accordingly, after her marriage in 1968, United forced Carolyn Evans (Evans)

---

13. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

14. Govtrack.us, S.181 [111th]: Lilly Ledbetter Fair Pay Act of 2009 (Apr. 18, 2009), http://www.govtrack.us/congress/bill.xpd?bill=s111-181 [hereinafter Govtrack.us, S181 [111th]].

15. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

16. *See* cases cited *supra* note 1.

17. 431 U.S. 553 (1977).

18. *Id.* at 554.

to resign from her flight attendant position.[19] Despite United's questionable policy, Evans did not file a claim with the Equal Employment Opportunity Commission within the applicable limitations period.[20] Therefore, Evans's claim arising from her separation with United expired.[21]

In November 1968, United entered a new collective-bargaining agreement, which effectively ended the "no marriage" flight attendant policy and provided for reinstatement of some of the flight attendants who had been terminated pursuant to that policy.[22] The agreement, however, did not cover Evans.[23] In 1972, after unsuccessfully seeking reinstatement several times, Evans applied, and was hired as a new employee.[24]

Despite carrying an identical employee identification number, United treated Evans as a new employee for seniority purposes.[25] Evans sued, claiming that even though the original adverse employment action was time-barred, United's refusal to give her credit for prior service gave present life to the past discriminatory act.[26] That is, Evans asserted her Title VII claim under a continuing violation theory.[27]

The Supreme Court acknowledged that the seniority system or, rather, United's refusal to recognize Evans's previous seniority benefits, continually impacted Evans's pay and benefits.[28] However, the Court distinguished between continuing and present violations.[29] Justice Stevens wrote for the Court, stating: "A discriminatory act which is not made the basis for a timely charge . . . is merely an unfortunate event in history which has no present legal consequences."[30] The Court noted that United's seniority system treated the discriminatorily discharged employees in the same manner as those non-discriminatorily discharged.[31] That is, United applied the system neutrally.[32] Therefore, the Court implied that there must be some intentional discriminatory act during the limitations period in order for a Title VII action to be timely.[33]

The *Evans* decision expressly rejected the continuing violation theory.[34] Distinguishing time-barred discriminatory acts and their effects during the

---

19. *Id.*
20. *Id.* at 555.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 556-57.
27. *See id.* at 558.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *See id.*

statutory period from violations actually occurring within the statutory period, the Court created a rather stringent approach for applying Title VII's limitations period for plaintiffs in such a position:

> Respondent is correct in pointing out that the seniority system gives present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by [Section] 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.[35]

Even at this early time in Title VII jurisprudence, the Court began developing a framework for applying the relevant limitations period in a manner that would not transfer discriminatory intent from expired discriminatory acts to related effects that fall within the statutory period.[36]

2. Effects v. Acts: Delaware State College v. Ricks.[37]—In March 1974, Delaware State College (Delaware) denied Columbus Ricks (Ricks), a black Liberian junior faculty member, tenure as a member of the college faculty.[38] Unsatisfied with that result, Ricks filed a grievance with Delaware's Educational Policy Committee which, in May 1974, took the matter under reconsideration.[39]

While the grievance was pending, Delaware continued its plans for Ricks's eventual dismissal.[40] On June 26, 1974, pursuant to university policies disfavoring the immediate termination of junior faculty members not offered tenure, Delaware offered Ricks a final, nonrenewable one-year contract.[41] Delaware informed Ricks that the contract would expire on June 30, 1975.[42] Ricks signed the contract on September 4, 1974.[43] One week later, the Educational Policy Committee denied Ricks's grievance.[44] Ricks filed suit under Title VII and other federal anti-discrimination statutes, arguing that the limitations period ran from his termination date, not when Delaware denied his tenure.[45]

The Supreme Court rejected Ricks's argument and found the action time-barred.[46] The Court held that the limitations period for Ricks's Title VII action

---

35. *Id.*
36. *See id.*
37. 449 U.S. 250 (1980).
38. *Id.* at 252.
39. *Id.*
40. *Id.*
41. *Id.* at 252-53.
42. *Id.* at 253.
43. *Id.* at 253-54.
44. *Id.* at 254.
45. *Id.*
46. *Id.* at 256.

ran from the time Delaware communicated its decision to deny Ricks's tenure.[47] The Court emphasized that Ricks failed to allege any discriminatory *act* occurring during the charging period.[48] Rather, the Court categorized Ricks's termination as an *effect* of Delaware's previous decision to deny tenure.[49]

The *Ricks* Court's categorization of acts and effects further reinforced *Evans*'s progeny, limiting employer liability to specific and distinct discriminatory acts that occur within the limitations period.[50]

3. Lessons from the Early Cases: The Continuing Violation Theory Will Not Support a Timely Title VII Action.—While *Evans* and *Ricks* do not involve disparate pay, they arguably foreclose the idea of the continuing violation theory in pay discrimination cases. Indeed, the Court's language essentially states this point.[51] The distinction between "acts" and "effects" implies that the law is unwilling to transfer discriminatory intent from earlier employment actions to later consequences. Justice Stevens's term, "merely an unfortunate event in history which has no present legal consequences,"[52] represents the Court's early and somewhat strict framework for applying Title VII's limitations period. At this point, courts had no excuse for disagreeing about whether subsequent discriminatory wages from time-barred discriminatory pay-setting decisions were actionable. *Evans* implies that the time barred pay-setting decision constitutes "relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered," it "is the legal equivalent of a discriminatory act which occurred before the statute was passed."[53] *Ricks* would term the discriminatory wages within the limitations period "effects" of an employer's alleged discriminatory act.[54] However, the progression of the civil rights movement and language from later opinions opened the door for debate about whether subsequent discriminatory pay from time-barred discriminatory pay-decisions constitutes an actionable wrong under Title VII.

B. The Modern Cases: Sources of Disagreement Among the Lower Courts

1. Facially-Discriminatory Compensation Schemes: Bazemore v. Friday.[55]—Prior to August 1, 1965, the North Carolina Agricultural Extension

---

47. *Id.* at 259.

48. *Id.* at 257.

49. *Id.* at 258.

50. *See id.*

51. *See id.* ("The emphasis is not upon the effects of earlier employment decisions; rather, it 'is [upon] whether any present *violation* exists.'") (quoting United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977)); *Evans*, 431 U.S. at 558 ("[Evans] emphasizes the fact that she has alleged a *continuing* violation. . . . But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists.").

52. *Evans*, 431 U.S. at 558.

53. *Id.*

54. *Ricks*, 449 U.S. at 257-58.

55. 478 U.S. 385 (1986).

Service (NCAES) segregated Caucasian and African-American service employees into two branches.[56] The Caucasian branch served Caucasian customers, while the African-American branch served African-American customers.[57] In response to the Civil Rights Act of 1964, North Carolina merged the NCAES branches into a single department.[58] This unification, however, did not result in the immediate elimination of pay disparities that existed between the Caucasian and African-American branches.[59] After Congress extended Title VII to include public employees in 1972, some African-American employees brought suit seeking recovery for the pay disparities that continued to exist from the old, dual pay scale.[60] The United States intervened, and the African-American workers amended their complaint on the eve of trial to add a claim under Title VII.[61]

The Supreme Court reversed the Court of Appeals decision, which rejected the African-American employees' Title VII disparate pay claim.[62] Specifically, the Court held that when employers implement a facially discriminatory pay scheme, they engage in intentional discrimination whenever they issue paychecks to disfavored employees in accordance with that scheme.[63]

Although the Court issued a per curium opinion, all members of the Court joined Justice Brennan's separate opinion, concurring in part.[64] In relevant part, Justice Brennan stated: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII."[65] Justice Brennan's simple statement is perhaps the most profound source of disagreement among lower courts' application of Title VII's limitation period to pay discrimination claims. One school of thought limits *Bazemore* and its progeny regarding individual payments of discriminatory wages to facially discriminatory pay structures.[66] The Supreme Court's *Ledbetter* opinion ultimately accepts this

---

56. *Id.* at 390.

57. *Id.*

58. *Id.* at 390-91.

59. *Id.* at 390.

60. *Id.* at 391.

61. *Id.*

62. *Id.* at 397.

63. *Id.* at 396-97.

64. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 646-47 (2007) (Ginsburg, J., dissenting) (noting that all members of the court agreed with Justice Brennan's *Bazemore* concurrence regarding discriminatory low payments to similarly situated African American employees, *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

65. *Bazemore*, 478 U.S. at 395-96 (Brennan, J., concurring in part, joined by all members of the Court).

66. *See, e.g.*, Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1182-83 (11th Cir. 2005), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

approach.[67] A number of courts, however, cite Justice Brennan's *Bazemore* opinion for the proposition that each discriminatory paycheck is a new Title VII violation, regardless of when the employer made the pay decision.[68]

2. Congressional Response as a Source of the Continuing Violation Theory: Lorance v. AT&T Technologies, Inc.[69]—In 1979, AT&T Technologies, Inc. (AT&T) changed its method for calculating seniority under its collective-bargaining agreement with tester employees, positions traditionally held by men.[70] Prior to the change, all employees at the plant earned seniority based solely on the number of years the plant had employed the employee.[71] The 1979 agreement made seniority for employees in tester positions depend on the time spent in that position alone.[72] Three years later, AT&T laid-off several female testers because of their lower seniority status under the 1979 collective-bargaining agreement.[73] The female testers filed a charge with the Equal Employment Opportunity Commission, alleging that AT&T adopted the new seniority system with the purpose of protecting male testers from lay-offs when women with more plant seniority moved into the traditionally-male tester positions.[74]

The Supreme Court found the women's action untimely because they failed to file within the charging period.[75] The Court determined that because the female testers alleged that AT&T adopted the new system with discriminatory intent but applied it neutrally to both genders, the limitations period ran from the time of the agreement's execution, not when the female testers felt the effects of the discriminatory act.[76]

Notably, Congress responded by amending Title VII to allow for employer liability stemming from both the adoption of an intentionally discriminatory

---

67. *See Ledbetter*, 550 U.S. at 637 (majority opinion).

68. *See, e.g.*, Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (describing the position set forth in *Bazemore* as "every paycheck stemming from a discriminatory pay scale is an actionable discrete discriminatory act"), *abrogated by Ledbetter*, 550 U.S. 618 (2007); Shea v. Rice, 409 F.3d 448, 452 (D.C. Cir. 2005) ("[E]mployer[s] commit[] a separate unlawful employment practice each time [they pay] one employee less than another for a discriminatory reason." (citing Bazemore v. Friday, 478 U.S. 385, 396 (1986))); Goodwin v. General Motors Corp., 275 F.3d 1005, 1009 (10th Cir. 2002) ("[*Bazemore*] has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a lingering effect of past discrimination—instead it is itself a continually recurring violation.").

69. 490 U.S. 900 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2) (2006).

70. *Id.* at 901-02.

71. *Id.*

72. *Id.* at 902.

73. *Id.*

74. *Id.* at 902-03.

75. *Id.* at 911-12.

76. *Id.* at 912.

seniority system and its application.[77] This response reinforced the schism between courts' treatment of the Title VII limitations period in the pay discrimination context. The congressional response after *Lorance* led some courts to believe that the *Lorance* decision incorrectly restricted employer liability in many cases involving current effects of past discrimination.[78] Of course, proponents of the other school of thought restricted the congressional intent inherent in the 1991 amendment to an expansion of employer liability only in the arena of seniority systems.[79]

3. The Great Divide: The Continuing Violation Theory in the Pay Discrimination Context v. Discriminatory Wages as Effects of Time-Barred Unlawful Acts.—Evans and *Ricks* developed a strict approach for applying Title VII's limitations period.[80] Under these early cases, the Court consistently distinguished between time-barred discriminatory acts and the effects of such acts that fall within the statutory period.[81] These cases, however, did not involve

---

77. The amended statute provides:

> For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

42 U.S.C. § 2000e-5(e)(2) (2006).

78. Indeed, Justice Ginsburg's dissenting opinion in *Ledbetter* interprets this legislative move as such:

> Until today, in the more than [fifteen] years since Congress amended Title VII, the Court had not once relied upon *Lorance*. It is mistaken to do so now. Just as Congress' "goals in enacting Title VII . . . never included conferring absolute immunity on discriminatorily adopted seniority systems that survive their first [180] days," Congress never intended to immunize forever discriminatory pay differentials unchallenged within 180 days of their adoption.

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 653-54 (Ginsburg, J., dissenting) (quoting *Lorance*, 490 U.S. at 914 (1989) (Marshall, J., dissenting), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2) (2006)), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

79. *See id.* at 627 n.2 (majority opinion) ("After *Lorance*, Congress amended Title VII to cover the specific situation involved in that case. . . . [T]he very legislative history cited by the dissent explains that this amendment and the other 1991 Title VII amendments '*expand[ed]* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.' For present purposes, what is most important about the amendment in question is that it applied only to the adoption of a discriminatory seniority system, not to other types of employment discrimination.") (citations omitted).

80. *See* Del. State Coll. v. Ricks, 449 U.S. 250, 257-58 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

81. *See, e.g.*, *Ricks*, 449 U.S. at 257-58.

pay discrimination. In *Bazemore*, the Court's first ruling on the application of Title VII's application period for disparate payment of wages, the Court found discriminatory wages within the limitations period separately actionable.[82] While the scope of this holding is arguably limited to facially discriminatory pay schemes,[83] it opened the door for the interpretation that each discriminatory paycheck is an actionable wrong under Title VII.[84] Under this interpretation, discriminatory wages paid within the relevant statutory period each constitute an actionable wrong under Title VII.[85] The congressional response after *Lorance* reinforced the possibility that Congress actually intended for the current effects of discriminatory acts that occurred outside the limitations period to be actionable.[86] Lower courts waited for clarification on the proper scope of these holdings in the pay discrimination context.

C. National Railroad Passenger Corp. v. Morgan:[87] *A New Framework for Identifying Unlawful Employment Actions in Title VII Cases*

In 2002, the Supreme Court addressed the circuits' problematic application of Title VII's limitation period in the pay discrimination context with its *Morgan* decision.[88] The Court approached the problem by distinguishing between two types of unlawful employment actions: "[D]iscrete acts" and "claims . . . based on the cumulative effect of individual acts."[89]

The Court held that discrete acts are temporally distinct;[90] thus, they each constitute an actionable unlawful practice.[91] The Supreme Court stated the following rule with respect to discrete discriminatory acts: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act."[92] Therefore, there is no continuing violation theory with respect to discrete discriminatory acts.[93] Rather,

---

82. Bazemore v. Friday, 478 U.S. 385, 395-97 (1986).

83. *See Ledbetter*, 550 U.S. at 637.

84. *Bazemore*, 478 U.S. at 395-96.

85. *See, e.g.*, Forsyth v. Fed'n Employment & Guidance Serv., 409 F.3d 565, 573 (2d Cir. 2005) (holding that both the decision to implement a discriminatory pay scale and payments made in accordance with such a scale may be the basis for pay discrimination causes of action under Title VII), *abrogated by Ledbetter*, 550 U.S. 618.

86. *See, e.g.*, *Ledbetter*, 550 U.S. at 652-54 (Ginsburg, J., dissenting) (generalizing the congressional response to *Lorance* as evidence that the *Lorance* decision was at odds with the overall purpose of Title VII).

87. 536 U.S. 101 (2002).

88. *Id.*

89. *Id.* at 114-15.

90. *Id.* at 114.

91. *Id.*

92. *Id.* at 113.

93. *See id.*

each alleged violation must be "independently discriminatory and . . . timely filed" in order to be actionable.[94] This definition of discrete acts does little to change the Court's historical dichotomy between acts and effects. Indeed, under *Morgan's* definition of discrete acts, the employer practices in *Evans* and *Ricks* are not actionable.[95] Therefore, the reader might wonder what this new definition of discrete acts really does to clarify which specific employment practices constitute the appropriate act for application of Title VII's limitation period.[96]

The Court acknowledged that claims based on the cumulative effects of individual acts were different in nature and, thus, should be treated accordingly.[97] The Court classified hostile work environment claims within this category because of their successive nature, the emphasis on the totality of the environment, not individual acts, and the lack of a particular temporal existence.[98] Thus, the series of acts "collectively constitute one 'unlawful employment practice.'"[99]

The Court's new dichotomy between discrete acts and cumulative effects of individual acts did little to clarify the appropriate application of the Title VII limitations period. Indeed, the introduction of a new category of employment practices that plaintiffs can aggregate into one adverse employment action may have actually blurred the appropriate boundaries for Title VII's limitations period even further. It certainly created another attractive argument for plaintiffs that found themselves without an independent discriminatory practice within the relevant statutory period. Now, plaintiffs could attempt to aggregate the current

---

94. *Id.*

95. In *Evans*, United applied the seniority system in a neutral manner. United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977). Therefore, United's application of the system would not have met the Court's standard for discrete acts, because it was not independently discriminatory. *See Morgan*, 536 U.S. at 113 (stating that a discrete act must be independently discriminatory in order to be actionable). Further, even if United adopted the system with the sole intent of discriminating against women with respect to seniority, the implementation of the system would not be actionable because Evans' claim was untimely. *See id.* (stating that a discrete act must be timely filed in order to be actionable).

Similarly, in *Ricks*, Delaware's decision to deny Ricks tenure would not be actionable because Ricks did not file within the relevant statutory limitations period. Del. State Coll. v. Ricks, 449 U.S. 250, 256 (1980). Nothing in the *Morgan* decision would change Ricks's termination from an effect of Delaware's decision to deny him tenure to an actual discriminatory act. *See Morgan*, 536 U.S. at 112-13 ("'Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination.' . . . [Ricks] could not use a termination that fell within the limitations period to pull in the time-barred discriminatory act. Nor could a time-barred act justify filing a charge concerning a termination that was not independently discriminatory.") (quoting *Ricks*, 449 U.S. 257).

96. Note, however, that untimely discriminatory acts may still be used as evidence in support of a timely claim. *Morgan*, 536 U.S. at 113.

97. *Id.* at 115-16.

98. *Id.*

99. *Id.* at 117 (quoting 42 U.S.C. § 2000e-(5)(e)(1) (2000)).

effects of past discriminatory acts into one unlawful action arising from the cumulative effects of a time-barred individual discriminatory act.[100]

D. The Circuit Split

Given the Supreme Court's often-imprecise application of the limitations period in Title VII cases, it comes as no surprise that lower courts disagreed about whether each paycheck made subject to an untimely discriminatory decision is actionable. After all, it is not clear exactly which employer actions constitute discrete acts and which do not. Moreover, some of the Court's language actually seemed to promote such a theory.[101]

This approach interpreting each paycheck made subject to an untimely discriminatory decision as actionable, however, seems to fly in the face of previous Supreme Court cases, such as *Evans* and *Ricks*, which were left intact by the *Bazemore* decision. For example, in *Evans*, the Court concluded that the "continuing effects of the precharging [sic] period discrimination did not make out a present violation."[102] Similarly, in *Ricks*, the Court held that the filing charge ran from the time Delaware communicated its decision not to offer the plaintiff tenure, not his actual termination.[103] Together, these cases illustrate the Court's tendency to distinguish between acts and effects.[104]

The Supreme Court's response in *Morgan* to this disagreement among circuits was apt. However, the Court's approach, distinguishing between discrete acts and cumulative effects merely restated the problem. After *Morgan*, although courts no longer had to determine whether related, discrete acts falling outside

---

100. Justice Ginsburg's dissenting *Ledbetter* opinion, discussed *infra* Part II.C.2, is one such attempt. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 651-52 (2007) (Ginsburg, J., dissenting) (describing the alleged discriminatory pay as a cumulative and gradually-developing scheme of discrimination, rather than a series of discrete acts), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

101. Remember Justice Brennan's statement in *Bazemore*: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." Bazemore v. Friday, 478 U.S. 385, 395-96 (1986) (Brennan, J., concurring in part, joined by all Members of the Court). Taken in isolation, many circuits cited *Bazemore* in support of a continuing violation theory or paycheck accrual rule. *See* Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1181 n.17 (11th Cir. 2005) (naming the Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits among those that approved of such an interpretation), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

102. *Ledbetter*, 550 U.S. at 625 (majority opinion).

103. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).

104. *See supra* Part I.A.

the statutory time period for filing charges under Title VII were actionable,[105] they now had to determine whether disparate pay claims based on compensation decisions before the statutory period involve a series of discrete discriminatory low paychecks or the cumulative effects of an individual act, the pay decision.

II. THE SUPREME COURT INTERPRETATION: *LEDBETTER V. GOODYEAR TIRE & RUBBER CO.*[106]

Lilly Ledbetter worked for Goodyear Tire & Rubber Co. (Goodyear) at its Gadsen, Alabama, plant for nearly nineteen years.[107] During most of this time, Ledbetter served as an area manager, a typically male-dominated position.[108] Initially, Ledbetter received a salary on par with her male counterparts performing similar work.[109]

Goodyear provided or denied raises for salaried employees based primarily on their supervisors' evaluation of the individual's job performance.[110] Over time, Ledbetter's salary slipped in comparison with the male area managers that had equal or less seniority.[111] In March 1998, Ledbetter submitted a questionnaire with the Equal Employment Opportunity Commission.[112] After retiring in November 1998, Ledbetter filed suit in federal court, alleging, among other things, that Goodyear violated Title VII when it paid her a discriminatorily low salary because of her sex.[113]

A. The Trial Court Decision

The district court granted summary judgment for Goodyear on a number of Ledbetter's claims.[114] It did, however, allow Ledbetter's pay discrimination claim to proceed to trial.[115] At trial, Ledbetter claimed that several of her Goodyear supervisors gave her poor performance evaluations because of her

---

105. In *Morgan*, the Supreme Court explicitly rejected the continuing violations theory:

> The Court of Appeals applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory . . . acts that are . . . related to that act may also be considered for the purposes of liability. With respect to this holding, therefore, we reverse.

Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 (2002) (citation omitted).

106. 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

107. *Id.* at 621.

108. *Id.* at 643 (Ginsburg, J., dissenting).

109. *See id.* at 622-23 (majority opinion).

110. *Id.* at 621.

111. *Id.* at 622.

112. *Id.* at 620.

113. *Id.* at 621-22.

114. *Id.* at 622.

115. *Id.*

sex.[116] She argued that, as a result of these discriminatory evaluations, Goodyear did not increase her pay as much as it would have if the supervisors had evaluated her in a nondiscriminatory manner.[117] Finally, Ledbetter introduced evidence that she received substantially less compensation than any of her male peers in similar positions.[118] The jury found in favor of Ledbetter and awarded her $223,776 in backpay, $4662 in mental anguish, and $3,285,979 in punitive damages.[119] After denying Goodyear's motion for judgment as a matter of law, the district court reduced the jury's recommended award.[120] Accordingly, the court entered judgment for Ledbetter in the sum of $360,000, plus attorneys' fees and costs.[121]

B. The Court of Appeals Decision

Goodyear appealed to the Eleventh Circuit Court of Appeals.[122] On appeal, Goodyear claimed that all of Ledbetter's pay discrimination claims based on pay decisions prior to the relevant 180-day filing period were time-barred.[123] Goodyear further argued that no intentional discriminatory act occurred after the filing period began to run.[124] The Eleventh Circuit reversed the district court's decision and held that a Title VII disparate-treatment pay claim may not be based on pay decisions before the last pay decision affecting the employee's pay during the limitations period.[125] Ledbetter appealed to the Supreme Court.[126]

C. The Supreme Court Decision

Essentially, Ledbetter's arguments fell under four broad categories. First, Ledbetter relied on evidence of past discrimination in an attempt to show that each paycheck that Goodyear issued during the charging period was a separate and discrete discriminatory act.[127] In support of this argument, Ledbetter cited

---

116. *Id.*

117. *Id.*

118. *Id.*

119. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169, 1176 (11th Cir. 2005), *aff'd*, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1177.

124. *Id.*

125. *Id.* at 1182-83.

126. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

127. *Id.* at 624.

Bazemore for the application of the "paycheck accrual rule."[128] Second, and in the alternative, Ledbetter argued that Goodyear's 1998 decision to deny her a raise "was unlawful because it carried forward intentionally discriminatory disparities from prior years."[129] Third, Ledbetter attempted to draw analogies between other civil rights statutes and Title VII. Specifically, Ledbetter cited the Equal Pay Act,[130] the Fair Labor Standards Act of 1938,[131] and the National Labor Relations Act.[132] Finally, Ledbetter introduced a number of policy arguments in favor of allowing an alleged victim of discrimination more time to file in the pay discrimination context.[133] In particular, Ledbetter argued that pay discrimination is more difficult to detect than other forms of discrimination.[134]

1. The Majority Opinion.—Writing for the majority, Justice Alito first emphasized that a Title VII plaintiff must file a charge with the Equal Employment Opportunity Commission within the relevant statutory period.[135] Justice Alito noted that, in order to determine whether a Title VII plaintiff filed on time, courts must first "identify with care the specific employment practice that is at issue."[136]

The Court concluded that prior precedent made it clear that new violations do not occur and, thus, a new limitations period does not run, merely because subsequent nondiscriminatory acts involve "adverse effects" of past discrimination.[137] Then, the Court explicitly stated that the "pay-setting decision[s] [are] . . . 'discrete act[s].'"[138] Perhaps in response to the confusion ignited by *Morgan's* distinction between discrete acts and cumulative effects of individual acts, Justice Alito went on to explain that the term "employment practice generally refers to a discrete act."[139] Therefore, cumulative effects of individual discriminatory acts, such as hostile work environment, are the exception, rather than the rule.[140] Finally, the Court stated that "[b]ecause a pay-setting decision is a 'discrete act,' it follows that the period for filing an [Equal Employment Opportunity Commission] charge begins when the act occurs."[141] That is, Title VII plaintiffs may not bring pay discrimination claims based on

---

128. *Id.* at 623.

129. *Id.* at 624 (internal quotations omitted).

130. 29 U.S.C. § 206 (2006).

131. *Id.* §§ 201-219.

132. *Id.* § 160.

133. *Ledbetter*, 550 U.S. at 642-43.

134. *Id.* at 642.

135. *Id.* at 623-24 (citing 42 U.S.C. § 2000e-5(e)(1) (2006)).

136. *Id.* at 624.

137. *Id.* at 628.

138. *Id.* at 621.

139. *Id.* at 628 (citing Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110-111 (2002)) (internal quotations omitted).

140. *See id.*

141. *Id.* at 621.

current salary.[142] Instead, plaintiffs must establish that an unlawful pay decision was actually made within the relevant statutory period.[143]

In response to Ledbetter's policy arguments favoring a longer limitations period for pay discrimination claims under Title VII, the Court cited a number of policy arguments of its own.[144] Specifically, the majority noted that limitations periods represent important legislative judgments about limiting liability.[145] It follows that Title VII's relatively short filing period indicates a clear congressional intent to encourage prompt resolution of claims under the statute. The Court also voiced concerns regarding the dangers of lost evidence when allowing tardy claims to proceed.[146]

Finally, and perhaps once again, to clarify the scope of its *Bazemore* holding, the Court explicitly rejected Ledbetter's paycheck accrual approach.[147] The Court limited *Bazemore*'s holding to cases involving facially discriminatory pay structures: "An employer that adopts and intentionally retains [a facially discriminatory] pay structure can surely be regarded as intending to discriminate . . . as long as the structure is used."[148]

2. The Scathing Dissent.—"Justice Ginsburg took the unusual step of reading a strongly worded dissent from the bench."[149] According to Justice Ginsburg, pay discrimination does not fit within the class of discrete discriminatory acts that are "easy to identify."[150]

Justice Ginsburg conveyed a number of concerns regarding the common characteristics of pay discrimination. First, because pay discrimination usually occurs in small increments and is gradual over time, it only becomes recognizable after a long period of time.[151] Second, employers often keep comparable pay information hidden from employees; therefore, even if victims of pay discrimination recognize that their compensation is stagnant, they may not be able to discover that the employer is treating others more favorably.[152] Finally, the dissent recognized *Morgan's* categorical approach to unlawful

---

142. *Id.*

143. *Id.* Note how the majority's approach severely limits the bite of Title VII in the pay discrimination context. Under *Ledbetter*, a plaintiff must establish an intentional and unlawful pay-setting decision within the limitations period. *See id.* Practically speaking, the likelihood a plaintiff will both recognize an unlawful pay-setting decision and file the action within the relevant statutory period is relatively low.

144. *See id.* at 642-43.

145. *Id.* at 632, 642-43.

146. *Id.* at 632.

147. *Id.* at 633.

148. *Id.* at 634.

149. David Copus, Pay Discrimination Claims After Ledbetter 9 (Oct. 20, 2007) (unpublished manuscript, on file with the American Employment Law Council).

150. *Ledbetter*, 550 U.S. at 648-49 (Ginsburg, J., dissenting).

151. *Id.* at 645.

152. *Id.*

employment actions.[153] Justice Ginsburg found, however, that pay discrimination is more akin to hostile work environment claims, and, thus, should be categorized as "'claims . . . based on the cumulative effect of individual acts.'"[154] In support of this argument, she noted that Ledbetter's pay fell from fifteen to forty percent below similarly situated male employees only after numerous successive performance evaluations and pay adjustments.[155]

Justice Ginsburg next appealed to prior Supreme Court precedent, statutory language, and lower court cases. She cited *Bazemore* for the proposition that "the unlawful practice is the *current payment* of salaries infected by gender-based (or race-based) discrimination . . . [and] occurs whenever a paycheck delivers less to a woman than to a similarly situated man."[156] The dissent also emphasized the fact that Congress amended Title VII after the *Lorance* decision, a move she claimed illustrated a congressional intent to foster protection for victims of discrimination.[157] In regards to Title VII's statutory language, Justice Ginsburg acknowledged that Title VII's back-pay provision[158] already allows employer liability to accrue for two years before the charge is filed, which "indicates that Congress contemplated challenges to pay discrimination commencing before, but continuing into, the . . . filing period."[159] Finally, Justice Ginsburg argued that the majority's opinion flew in the face of the overwhelming

---

153. *Id.* at 647-48. Justice Ginsburg's argument that Title VII pay discrimination claims should be treated as cumulative effects, rather than discrete acts, recognizes the true bite of the majority's opinion. Under the majority's view, Title VII plaintiffs may not base pay discrimination claims on current salary. *See id.* at 621 (majority opinion). Rather, they must rely on an unlawful pay-setting decision within the past 180 days (or 300 days in jurisdictions with state agencies that enjoy primary jurisdiction). *See id.* This is a rather tough burden to meet. Under the dissent's view of Title VII pay discrimination as claims based on the cumulative effects of individual acts, plaintiffs could rely on the overall effect of past decisions as they impact current salary. *See id.* at 648 (Ginsburg, J., dissenting).

Therefore, the LFPA may be misplaced in focusing on the timeliness issue. *See infra* Part III. That is, the LFPA does little to address the categorization of pay discrimination as a discrete act. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16). Title VII plaintiffs will still have to focus on discrete, unlawful compensation decisions or payments, within the relevant statutory period. Although a longer statutory period provides Title VII plaintiffs with more time to bring claims, it is often more difficult for plaintiffs to reconstruct unlawful decisions affecting similarly situated individuals further into the past. Thus, it is unclear just how effective the LFPA will be.

154. *Ledbetter*, 550 U.S. at 648 (Ginsburg, J., dissenting) (quoting Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002)).

155. *Id.* at 648-49.

156. *Id.* at 645 (citing Bazemore v. Friday, 478 U.S. 385, 395 (1986) (Brennan, J., concurring in part, joined by all other members of the Court)).

157. *Id.* at 652-53.

158. *See* 42 U.S.C. § 2000e-5(g)(1) (2006) ("Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.").

159. *Ledbetter*, 550 U.S. at 654 (Ginsburg, J., dissenting) (citing *Morgan*, 536 U.S. at 119).

majority of Courts of Appeals decisions on the subject.[160]

D. Pay Discrimination: Discrete Acts or Cumulative Effects

The *Ledbetter* majority and dissent each offer very different, yet understandable, approaches to the problematic application of Title VII's limitations period in the pay discrimination context. On one hand, the *Ledbetter* majority emphasized that "[s]tatutes of limitations serve a policy of repose."[161] Statutory limitations periods are legislative judgments about the appropriate amount of time that a party has to bring an action.[162] Therefore, Title VII's relatively short limitations period actually represents congressional preference for prompt resolution of employment discrimination claims.[163] Limiting Title VII's limitations period in the pay discrimination context in a manner similar to other Title VII discrimination cases encourages employees to bring prompt claims. Therefore, Title VII disparate-treatment pay claims should be treated like other Title VII discrimination allegations regarding the application of the statute's limitations period.

On the other hand, Justice Ginsburg offers some legitimate observations regarding the unique nature of pay discrimination.[164] Because differences in pay may be due to numerous performance evaluations and take a long time to become substantial enough to observe, it may be unfair to expect employees to bring actions within the same limitations period as the other forms of unlawful acts under Title VII.[165] Perhaps these special considerations should require courts to treat discriminatory pay in a way that reflects its evasive nature. After all, Title VII's ultimate goal is achieving "equality of employment opportunities."[166]

Both the majority and dissent make strong arguments. Indeed, each represents one of the competing interests that must be considered when applying Title VII's limitations period in the pay discrimination context. The majority's view favors the interest in "'protect[ing] employers from the burden of defending claims arising from employment decisions that are long past.'"[167] The dissent's view favors the employee's interest in avoiding evasive, unlawful discriminatory actions that create unequal employment opportunities.[168] Given the strong arguments on each side, it is no surprise that Congress responded by proposing legislation that would help clarify the "appropriate" application of Title VII's

---

160. *See id.* at 654-55.

161. *Id.* at 630 (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 554-55 (1974)).

162. *See id.* (quoting United States v. Kubrick, 444 U.S. 111, 117 (1979)).

163. *See id.* at 630-31 (citing Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367-68 (1977)).

164. *See id.* at 645 (Ginsburg, J., dissenting).

165. *Id.* at 650-51.

166. *Occidental*, 432 U.S. at 368 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974)).

167. *Ledbetter*, 550 U.S. at 630 (majority opinion) (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980)).

168. *See id.* at 645 (Ginsburg, J., dissenting).

limitations period in the pay discrimination context.

III. CONGRESSIONAL RESPONSE: THE LILLY LEDBETTER FAIR PAY ACT

On June 22, 2007, just weeks after the Supreme Court's *Ledbetter* decision, congressional Democrats responded. Representative George Miller of California introduced the Bill[169] in the United States House of Representatives. Support for the LFPA was largely divided along party lines.[170]

A. Proposal and Status

Democratic proponents of the Bill claimed that the legislation merely attempted to reverse the Supreme Court's *Ledbetter* decision.[171] As such, Democratic supporters basically argued that each paycheck resulting from earlier discrimination should constitute a violation under the Civil Rights Act of 1964.[172] Republicans, however, termed the Bill "hastily-written" and "the most substantial change to employment law in more than four decades."[173]

On July 31, 2007, the Bill passed the House of Representatives by a vote of

---

169. H.R. 2831, 110th Cong. (2007).

170. Republicans represented just two of the 225 votes supporting the LFPA, or 0.89%. Govtrack.us, H.R. 2831 [110th], *supra* note 11. Democrats represented six of the 199 nays, or 1.51%. *Id.* Nine representatives did not vote. *Id.*

171. *See, e.g.*, Press Release, Democratic Committee on Education and Labor, U.S. House of Representatives, House Passes Bill to Restore Workers' Rights to Challenge Pay Discrimination Claims: The Lilly Ledbetter Fair Pay Act Rectifies Flawed Supreme Court Ruling on Pay Discrimination (July 31, 2007) [hereinafter Democratic Committee], *available at* http://www.house.gov/apps/list/speech/edlabor_dem/rel073107.html ("The Lilly Ledbetter Fair Pay Act would clarify that every paycheck or other compensation resulting, in whole or in part, from an earlier discriminatory pay decision constitutes a violation of the Civil Rights Act. As long as workers file their charges within 180 days of a discriminatory paycheck, their charges would be considered timely. This was the law prior to the Supreme Court's May 2007 [*Ledbetter*] decision.").

172. *Id.*

173. Press Release, Republican Committee on Education and Labor, U.S. House of Representatives, House Democrats Undermine 40 Years of Civil Rights Law, Open the Door for Unbridled Litigation (July 31, 2007) [hereinafter Republican Committee], *available at* http://republicans.edlabor.house.gov/PRArticle.aspx?NewsID=224. Senior Republican Member of the House Committee on Education and Labor, Congressman Howard P. "Buck" McKeon, stated:

> [A]s we combat discrimination in the workplace, we also must stand firmly behind a process that ensures justice for all—and that includes protecting against the potential for abuse and excessive litigation. That, I believe, is where Democrats and Republicans diverge. We aren't taking sides for or against discrimination in the workplace. Rather, we're staking out distinct positions on fair and equitable justice and the rule of law.

Id.

225 to 199.[174] The Senate placed it on the Senate Legislative Calendar under General Orders.[175] On April 23, 2008, however, the Bill failed a cloture motion for consideration in the Senate.[176] The cloture motion received fifty-six ayes, four short of the sixty necessary to begin the Bill's consideration in the Senate.[177]

On January 8, 2009, Senator Barbara Mikulski (Democrat—Maryland) introduced the LFPA to the United States Senate.[178] It passed the Senate and House of Representatives on January 22, 2009, and January 27, 2009, respectively.[179] President Obama signed the LFPA into law on January 29, 2009.[180] The LFPA, as enacted, is nearly identical to the Bill, deviating only with respect to minor grammar syntax and an updated citation to the Supreme Court's *Ledbetter* decision.[181]

B. Legal Effect

The LFPA essentially amends four statutes: (1) the Civil Rights Act of 1964;[182] (2) the Age Discrimination in Employment Act of 1967;[183] (3) the Americans with Disabilities Act of 1990;[184] and (4) the National Rehabilitation Act of 1973.[185] The LFPA provides, in pertinent part, as follows:

> [A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[186]

Accordingly, the LFPA clearly overturns the *Ledbetter* majority opinion.[187] In

---

174. Govtrack.us, H.R. 2831 [110th], *supra* note 11.

175. *Id.*

176. *Id.*

177. Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at 22.

178. Govtrack.us, S. 181 [111th], *supra* note 14.

179. *Id.*

180. *Id.*

181. *Compare* Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. § 2000e-5, -16), *with* H.R. 2831, 110th Cong. (2007).

182. 42 U.S.C. §§ 2000a-2000h-6 (2006).

183. 29 U.S.C. §§ 621-34 (2006).

184. 42 U.S.C. §§ 12101-12213 (2006).

185. 29 U.S.C. §§ 701-796*l* (2006).

186. Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)).

187. Note, however, the LFPA does not address the *Ledbetter* majority's categorization of pay discrimination as a discrete act. *See supra* note 153. That is, although the legislation may change

fact, the legislation adopts the paycheck accrual rule that the Supreme Court expressly rejected.[188] The LFPA's ramifications, however, are not limited to its impact on the procedural application of Title VII's limitations period in pay discrimination cases.[189] It has the potential to go much further and substantially change the face of discrimination law in many other areas as well as reallocate the policy priorities determined by current employment law.[190]

C. Practical Implications

Given the LFPA's potentially broad reach, it is important to understand the practical implications of the legislation's enactment. The LFPA certainly addresses Justice Ginsburg's concerns in her *Ledbetter* dissent;[191] however, critics remain unconvinced that the proposed legislation is an equitable approach to applying Title VII's limitations period in the pay discrimination context.[192]

---

applicable limitations periods in the compensation context, it will not relieve Title VII plaintiffs' hardships in many other areas. *See* Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)). Therefore, the reader should remember that even though critics or proponents make the following, albeit compelling, arguments, the practical impact of the LFPA is largely unknown. It is, however, important to comprehend the arguments on both sides to properly understand the competing interests at hand and formulate any truly "appropriate" application of Title VII's limitations period. Therefore, at the very least, this Part discusses some of the most important policy considerations inherent in the application of Title VII's limitations period in the pay discrimination context. Even though the LFPA addresses this problem by attempting to change the categorization of pay discrimination from a claim based on a discrete act to one based on the cumulative effect of individual acts, the same competing interests are still at play. Thus, they are relevant to any proposed solution to the problematic application of Title VII's limitation period in the pay discrimination context.

188. *See* Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)).

189. *See* Republican Committee, *supra* note 173.

190. *Id.*

191. *Compare* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting) ("The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur . . . in small increments; cause to suspect that discrimination is at work develops only over time. . . . Employers may keep [any pay differentials] under wraps . . . ."), *with* Lilly Ledbetter Fair Pay Act of 2009 § 2(2), Pub. L. No. 111-2, 123 Stat. 5 (2009) ("The limitation imposed by the [*Ledbetter*] Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination . . . .").

192. *See* Press Release, National Retail Foundation, NRF Calls Fair Pay Act "Litigation Time Bomb" (July 30, 2007), *available at* http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=346 ("The National Retail Federation today urged the House to reject legislation that would effectively eliminate the statute of limitations in employment discrimination cases, calling the measure a 'litigation time bomb' that would create 'a lawsuit bonanza' for trial lawyers."); Republican Committee, *supra* note 173 ("In reality, however, House Republicans and a coalition of some 40-plus organizations have exposed [the LFPA] as an effort to open the door

1. Concerns: The LFPA's Shortcomings.—Critics of the LFPA point to the legislation's broad scope as an indicator that it has the potential to significantly expand employer liability.[193] For example, because the LFPA amends several civil rights statutes, it essentially removes a limitations period for all factual scenarios that can be framed as a "discriminatory compensation decision or other practice."[194] Similarly, the LFPA's language about "wages, benefits, or other compensation"[195] has the potential to significantly expand temporal liability for employers.[196]

If the term "benefits," for example, includes retirement or pension plans, an employer could potentially remain liable for a pay decision that took place several decades ago. Further, almost all adverse employment actions have an impact on compensation. For example, denied promotions or disciplinary actions often affect an employee's compensation entitlement.[197] Critics argue such a broad reading of compensation would lead to almost a complete elimination of limitation periods for far too many Title VII claims.[198] For example, following the LFPA introduction, the American Benefits Council expressed its concern that removing Title VII's limitations period could substantially undermine the solvency of pension plans in the United States.[199]

This poses some obvious concerns for employers and courts. Frivolous suits are often the product of stale claims and lost evidence. Moreover, the mere cost for employers to retain documentation to protect against such a broad concept of liability is troublesome.

Additionally, the Equal Employment Opportunity Commission only requires employers to keep records made regarding "rates of pay or other terms of compensation" for one year.[200] "The agency selected one year as the appropriate period 'so that there [would be] *no possibility* that an employer or labor organization [would] have legally destroyed its employment records before being notified that a charge [had] been filed.'"[201] When a plaintiff files a charge with

---

for trial lawyers across the nation to cash-in on the most substantial change to employment law in more than four decades.").

193. *See, e.g.*, Republican Committee, *supra* note 173.

194. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16). *See The Impact of* Ledbetter v. Goodyear *on the Effective Enforcement of Civil Rights Laws: Hearings on H.R. 2831 Before the House Subcomm. On the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary*, 110th Cong. 63 (2007) [hereinafter *Hearings*] (testimony of Neal D. Mollen).

195. Lilly Ledbetter Fair Pay Act of 2009 § 3, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 42 U.S.C. § 2000e-5(e)).

196. *See Hearings*, *supra* note 194, at 63 (testimony of Neal D. Mollen).

197. *Id.* at 60 (testimony of Neal D. Mollen).

198. *Id.* at 62-63 (testimony of Neal D. Mollen).

199. Republican Committee, *supra* note 173.

200. 29 C.F.R. § 1602.14 (2007).

201. *Hearings*, *supra* note 194, at 58 (quoting 54 Fed. Reg. 6551 (Feb. 13, 1989) (emphasis in original)) (testimony of Neal D. Mollen).

the Equal Employment Opportunity Commission, however, the employer must keep all records related to the complaint until the claim is resolved.[202] These administrative decisions reflect a desire to balance the need to retain evidence related to a Title VII discrimination charge with the costs of doing so, and this balancing test was assumedly a factor in Congress's decision to define a relatively short limitations period for Title VII claims. With the passage of the LFPA, employers may "be obligated to keep [pay and compensation] records, not for one year, but in perpetuity."[203]

Finally, the LFPA does not distinguish between those plaintiffs who do not report pay discrimination due to its evasive nature and those who delay allegations for their own self-interest. Therefore, the legislation shifts responsibility from plaintiffs who, perhaps intentionally, sit on stale claims, to employers who are vulnerable to lost evidence. As one commentator noted,

> It violates the most basic notions of justice to allow an individual—even one who may have been subjected to discrimination—to wait until the employer is essentially defenseless to raise the allegation. The [*Ledbetter*] Court rightly concluded that this sort of delay is unacceptable. That decision should be embraced, not reversed.[204]

That is, the LFPA's failure to distinguish among a plaintiff's motivations in waiting to bring suit may perpetuate any problems created by lost evidence and stale claims.

2. Progress: Recognizing Where the LFPA Succeeds.—Although critics of the LFPA raise valid concerns, the LFPA effectively advances progress in combating discrimination in a number of areas. First, and most importantly, it emphasizes Title VII's "primary objective" of "bring[ing] employment discrimination to an end."[205] It replaces the *Ledbetter* decision's employer-favored policy considerations regarding limitations periods with those to which the statute explicitly cites. Indeed, Section 2(1) of the LFPA provides:

> The Supreme Court in [*Ledbetter v. Goodyear Tire & Rubber Co.*], 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decision or other practices, contrary to the intent of Congress.[206]

Second, the LFPA addresses Justice Ginsburg's concerns regarding the unique nature of pay discrimination by creating a new statute of limitations for

---

202. *Id.* at 59 (testimony of Neal D. Mollen).

203. *Id.* (testimony of Neal D. Mollen).

204. *Id.* (testimony of Neal D. Mollen).

205. Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982).

206. Lilly Ledbetter Fair Pay Act of 2009 § 2(1), Pub. L. No. 111-2, 123 Stat. 5 (2009).

Title VII disparate-pay cases. The congressional findings included in the LFPA state, "The limitation imposed by the [*Ledbetter* majority] on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended."[207]

While critics would argue that the LFPA actually attempts to eliminate the previous Title VII limitations period for all claims that could theoretically be categorized as compensation decisions or practices,[208] the Act's proponents claim that the legislation merely returns the law to its place before the *Ledbetter* decision.[209] Representative George Miller stated: "As long as workers file their charges within 180 days of a discriminatory paycheck, their charges would be considered timely. This was the law prior to the Supreme Court's [*Ledbetter*] decision."[210] Further, LFPA-supporters argue that returning to this "prior law" will not result in a significant increase in direct spending or affect revenues.[211]

Finally, the LFPA addresses the fact that the Civil Rights Act of 1964 already has several pro-employer factors built into Title VII.[212] These include: (1) the employee bears the burden of proof; (2) the employer's burden is often extremely easy to meet; (3) proof of employer intent is often difficult to obtain; (4) equitable doctrines that frequently protect employers from liability; and (5) Title VII's limitation on damages.[213] LFPA-supporters claim that increasing the employee's burden amidst these pro-employer characteristics actually restricts courts' ability to promote the preventative purpose of Title VII.[214]

IV. RECONCILING THE PARTY SPLIT: COMPETING POLICIES, EQUITABLE JUDICIARY DOCTRINES, AND A MODIFIED BALANCING TEST FOR TOLLING TITLE VII'S LIMITATIONS PERIOD IN THE PAY DISCRIMINATION CONTEXT

Not surprisingly, the LFPA's critics and proponents represent competing interests in the fair and equitable resolution of pay discrimination claims under Title VII. The critics' primary concerns include: (1) excessive litigation due to

---

207. Lilly Ledbetter Fair Pay Act of 2009 § 2(2), Pub. L. No. 111-2, 123 Stat. 5 (2009).

208. *See Hearings*, *supra* note 194, at 63 (testimony of Neal D. Mollen).

209. *See, e.g.*, Democratic Committee, *supra* note 171. *See also The Supreme Court, 2006 Term—Leading Cases III*, 121 HARV. L. REV. 355, 364 n.62 (2007) [hereinafter *Leading Cases*] (arguing that the Second, Third, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all applied the paycheck accrual rule prior to the *Ledbetter* decision). *But see Hearings*, *supra* note 194, at 60 (testimony of Neal D. Mollen) (mentioning the Seventh Circuit's decision in Dasgupta v. Univ. of Wis. Bd. of Regents, 121 F.3d 1138 (7th Cir. 1997), as evidence that lower courts did not uniformly embrace the paycheck accrual rule).

210. *See e.g.*, Democratic Committee, *supra* note 171.

211. Congressional Budget Office, 110th Cong., Report on Cost Estimate for H.R. 2831: Lilly Ledbetter Fair Pay Act of 2007 (Comm. Print 2007).

212. *See Leading Cases*, *supra* note 209, at 364.

213. *Id.*

214. *Id.*

the LFPA's abrogation of any meaningful limitations period; (2) expansion in the scope of liability due to ambiguous statutory language and "compensation" as a broad category; and (3) prejudice to employers from lost evidence in stale claims.[215] The LFPA's supporters are primarily concerned with: (1) quick resolution of pay discrimination claims; (2) judicial cognizance of pay discrimination's idiosyncrasies; and (3) fairness to discrimination victims.[216]

Party lines and politics aside, both views raise legitimate concerns that discrimination law has attempted to balance over the past four decades. Therefore, any satisfactory approach to the application of Title VII's limitations period in the pay discrimination context must, at the very least, recognize each position.

A. Equitable Judiciary Doctrines as a Means of Tolling Title VII's Statutory Limitations Period

The reader may wonder if any change in pay discrimination jurisprudence was necessary, given the various equitable doctrines the judiciary has at its disposal to deal with timeliness issues. Therefore, before considering whether the LFPA is a necessary congressional response to a complex interaction of competing interests in the pay discrimination context, one should determine whether equitable judiciary doctrines would allow the court enough flexibility to manage the majority of cases within this arena.

1. The Discovery Rule.—The discovery rule addresses when a claimant's statute of limitations actually begins to run.[217] Essentially, it is a common law equitable doctrine that delays a limitations period from running until a plaintiff discovers the injury in question.[218]

The Supreme Court has expressly mentioned the possibility that the discovery rule could potentially apply in the employment discrimination context on several occasions.[219] The Court acknowledged the issue in both *Morgan* and *Ledbetter*, but declined to rule on it in each case.[220] Previous Supreme Court

---

215. *See supra* Part III.C.

216. *See supra* Part III.C.

217. Copus, *supra* note 149, at 13.

218. *Id.*

219. *See generally id.* at 13-19.

220. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 642 n.10 (2007) ("We have previously declined to address whether Title VII suits are amenable to a discovery rule. Because Ledbetter does not argue that such a rule would change the outcome in her case, we have no occasion to address this issue.") (citation omitted), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16); Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114 n.7 (2002) ("There may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue.").

decisions, however, imply that the Court does, indeed, apply the discovery rule when determining when the limitations period accrues in the employment discrimination context.[221] For example, in *Ricks*, the Court held that the limitations period began when Delaware's "decision was made and communicated to Ricks."[222] The *Ledbetter* opinion also relied on the employer's communication of the discriminatory conduct as the point of the cause of action's accrual. The Court stated: "Ledbetter should have filed an [Equal Employment Opportunity Commission] charge within 180 days after each allegedly discriminatory pay decision was made and communicated to her."[223] "In theory at least, an employee suffers an injury at the time the employer makes the allegedly unlawful decision."[224] Therefore, the limitations period should accrue when the employer makes the decision. The Court's continual reference to the time when the employer communicates the unlawful decision to the employee, however, indicates that the plaintiff's discovery of the injury actually commences the limitations period.[225]

Even if the Supreme Court formally acknowledges its application of the discovery rule in Title VII pay discrimination cases, the equitable doctrine will do little to address the concerns of Justice Ginsburg and LFPA proponents.[226] The discovery rule would only postpone the accrual of the limitations period until the employee learns of the unlawful decision, even if the employee is unaware of its discriminatory effect.[227] Therefore, under the discovery rule, the limitations period would begin to run when the employee learned of the discriminatorily low pay, even if the employee was unaware that it was, in fact, discriminatory. This equitable doctrine does little to address the employee's difficulty in accessing comparative pay information and the gradual development of discriminatory pay differentials.

2. Equitable Tolling and Equitable Estoppel.—Equitable tolling and equitable estoppel revolve around the idea that defendants should not be allowed to avoid liability by courts' formulaic application of limitations periods.[228] Courts, however, generally decline to invoke these doctrines where the employer

---

221. *See* Copus, *supra* note 149, at 18-19.

222. Del. State Coll. v. Ricks, 449 U.S. 250, 258 (1980).

223. *Ledbetter*, 550 U.S. at 628.

224. Copus, *supra* note 149, at 16. Note *Ledbetter* expressly applied *Morgan's* "discrete act" dichotomy to the pay discrimination context: "Because a pay-setting decision is a 'discrete act,' it follows that the period for filing an [Equal Employment Opportunity Commission] charge begins when the act occurs." *Ledbetter*, 550 U.S. at 621.

225. Copus, *supra* note 149, at 18-19.

226. *Id.* at 13.

227. *Id.* at 17 n.9.

228. Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232-33 (1959) ("[N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.").

did not engage in misconduct.[229] Further, even where the employer deceives a plaintiff, some courts still refuse to suspend limitations periods if the plaintiff remained suspicious about discrimination or should reasonably have been.[230]

Equitable tolling and estoppel, therefore, usually only apply in cases of extreme employer misconduct. While these doctrines would allow some plaintiffs to suspend their charge-filing periods, they would do little to address the majority of cases. When the employer intentionally pays an employee a discriminatory wage, these doctrines would not generally protect employees unless the employer also proactively attempted to mislead the employee.[231]

3. The Effectiveness of the Common Law Equitable Doctrines of Limitations Periods in the Pay Discrimination Context.—Current common law equitable doctrines are inadequate with respect to the majority of pay discrimination cases. Even if applied, the discovery rule would generally only suspend the limitations period from accruing for a few days.[232] In other words, because the discovery rule only operates to delay the accrual of the limitations period in pay discrimination cases until the employee learns of the discriminatory pay, the charging period will usually begin to run when the employer issues the next discriminatory paycheck. This doctrine may marginally increase the length of limitations periods in Title VII pay discrimination cases, but it does not materially impact the large majority of cases.[233]

Equitable tolling and estoppel are somewhat more useful for plaintiffs in the pay discrimination arena. These doctrines, however, have consistently been limited to those instances of extreme employer misconduct.[234] Therefore, they will only protect employees in the most extreme cases.

B. A Policy-Oriented Modified Balancing Test for Applying Title VII's Limitations Period in the Pay Discrimination Context

Because current equitable judicial doctrines of limitations periods do not adequately address the majority of pay discrimination cases, the *Ledbetter* rule failed to recognize some very important policy considerations. The *Ledbetter* rule ignored the idiosyncrasies of pay discrimination and Title VII's ultimate goal of eradicating discrimination.[235] It also failed to recognize that Title VII has many pro-employer tendencies.[236] The LFPA, however, addresses these policy

---

229. Copus, *supra* note 149, at 23.

230. *See id.* at 22.

231. *See id.* at 22-23.

232. *Id.* at 13.

233. *See id.*

234. *Id.* at 22-23.

235. *See* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 646-50 (2007) (Ginsburg, J., dissenting), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16); Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982).

236. *Leading Cases*, *supra* note 209, at 364.

considerations with extreme preference for employee-friendly policies. Specifically, the LFPA ignores the problem of lost evidence and Congress's preference for prompt resolution of discrimination claims.[237] Not only does the LFPA exchange the *Ledbetter* rule's pro-employer policies for an equally pro-plaintiff perspective, but it also has the potential to substantially increase the amount of employment discrimination litigation via broad and ambiguous statutory language.[238]

Any approach to the application of Title VII's limitations period in the pay discrimination context must recognize all of the important, albeit competing, interests at stake. Specifically, it must weigh the: (1) potential for excessive litigation due to variations in Title VII's limitations period; (2) expansion in the scope of claims; (3) prejudice to employers from lost evidence in stale claims; (4) quick resolution of pay discrimination claims; (5) idiosyncrasies of pay discrimination; and (6) fairness to discrimination victims. *Ledbetter's* pro-employer rule fails to address concerns regarding fairness to employees and the realities of pay discrimination. The LFPA does not address lost evidence due to stale claims and the benefits of prompt actions. Both fall short.

A modified approach that balances the interests of both employers and employees is necessary to adequately manage the application of Title VII's limitations period in the pay discrimination context. Under this modified approach, as a default rule, Title VII's charging period will commence when the employee learns of the discriminatory act, i.e., pay.[239] An alleged victim of pay discrimination could, however, expand the limitations period by presenting sufficient evidence that a reasonable person would not have known that the payments were discriminatory.[240] Where a plaintiff presents sufficient evidence in this regard, the court will balance a number of factors to determine whether, and to what extent, the limitations period should be tolled. These factors include the: (1) length of time that has passed since the discriminatory act; (2) prejudice to the employer from lost evidence; (3) impact on the quick resolution of pay discrimination claims; (4) wrongfulness of the employer's conduct; (5) alleged victim's ability to obtain comparable pay information while receiving discriminatory pay; and (6) differences in pay between the alleged victim and similarly situated victims.

If, on balance, the court determines that the facts of the case justify the plaintiff's inaction, the court may, within its discretion, toll the limitations period in a manner that is equitable, given the totality of the circumstances. Of course,

---

237. *See Hearings*, *supra* note 194, at 58-59 (testimony of Neal D. Mollen).

238. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

239. The employee's knowledge of the act, however, does not require knowledge of discriminatory effect or motive. This shortcoming will be checked by the employee's ability to expand the limitations period by establishing that a reasonable person would not have known that the payments were discriminatory.

240. Note this approach essentially converts the current discovery rule into an equitable doctrine that justifies a plaintiff's inaction where it is reasonable under the circumstances.

the length of tolling will likely vary depending on the court's evaluation of many of the modified balancing test factors. For example, all else being constant, greater employer misconduct will result in a longer tolling period; greater access to information about pay disparity will lead to a shorter tolling period.

These factors address the primary concerns of both employer and employee policies and allow for flexibility so that the judiciary can address the equities of the specific factual circumstances. Applying Title VII's current limitations period as a default rule and placing the burden of proof regarding the reasonableness of pay differential knowledge promotes prompt resolution of pay discrimination claims. Weighing the prejudice to the employer from lost evidence recognizes the difficulty in proving a non-discriminatory motive in stale claims and deters plaintiffs from waiting until employers are defenseless to bring pay discrimination claims. The wrongfulness of the employer's misconduct and the plaintiff's access to comparable pay information address the realities of pay discrimination. That is, it allows the court to toll the limitations period when employers hide pay information or employees have no reasonable means to access it. Finally, the difference in pay between the plaintiff and similarly situated individuals gauges whether the plaintiff should have reasonably recognized the discriminatory effect earlier, weighs the employer's misconduct, and recognizes that fairness to discrimination victims, in many cases, requires a finding of damages.

Critics of this approach to the application of Title VII's limitations period in the pay discrimination context will, undoubtedly, emphasize the fluidity of the modified balancing test. Many will say it has no workable standard, resulting in ambiguity for employers and employees alike, not to mention challenges in judicial application. That view, however, fails to recognize the amount of flexibility necessary to adequately deal with the complexities of pay discrimination. Organizations employ different policies regarding the disclosure of compensation information, and discriminatory acts vary in severity. This test allows courts to address the unique nature of each claim and use its discretion to find the optimal length of Title VII's limitation period under the circumstances.

Critics will also say that this approach, like the LFPA, essentially eliminates any meaningful limitations period for Title VII pay discrimination cases. If this ambiguity is truly more troublesome than the inequities in ignoring the complexities in pay discrimination cases, this argument has merit. The modified test, however, will apply Title VII's current limitations period, unless plaintiffs can establish that the unique nature of pay discrimination unfairly kept them from identifying the wrong. Therefore, it favors the current limitations period, unless justice requires otherwise.

Even if the critics are correct in arguing that this modified test merely replaces current law with an unworkable standard that eliminates meaningful limitations on liability, they must at least admit that the optimal application of Title VII's limitations period will recognize the very real and very different political interests at hand. The current lopsided approaches inevitably result in unfairness to either employers, in the case of the LFPA, or employees, in the case of the *Ledbetter* rule. Therefore, a compromising standard that allows courts to recognize both competing interests is necessary if the judiciary is ever to

effectively manage the problematic application of Title VII's limitations period in the pay discrimination context.

CONCLUSION

The competing interests inherent in pay discrimination claims make the application of Title VII's limitations period particularly troublesome within that context. Several early Supreme Court Title VII decisions distinguished between intentional discriminatory acts outside Title VII's charging period and the consequences of those acts that occur during the statutory period.[241] Subsequent decisions and congressional amendments, however, opened the door for confusion among lower courts with respect to the broad congressional intent for the Civil Rights Act of 1964 and pay discrimination claims, in particular.[242] In May 2007, the *Ledbetter* Court finally clarified the Supreme Court's approach for applying Title VII's limitations period in pay discrimination cases.[243] However, Congress responded quickly and overturned *Ledbetter* with the LFPA.[244] Neither approach fully appreciates the complexities of pay discrimination. Further, traditional common law doctrines for tolling limitations period are not adequate to rectify the shortcomings.[245] Therefore, a modified approach is necessary. This approach must recognize both employee and employer perspectives as well as retain the flexibility necessary to adjust limitations periods when justice so requires. Only then will courts genuinely promote the congressional intent and case-specific equities inherent in Title VII pay discrimination claims.

---

241. *See, e.g.*, Del. State Coll. v. Ricks, 449 U.S. 250, 259 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

242. *See* Lorance v. AT&T Techs., Inc., 490 U.S. 900, 912 (1989), *superseded by statute*, Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(e)(2) (2006).

243. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 621 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

244. *See* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (to be codified at 29 U.S.C. §§ 626, 794a, and 42 U.S.C. §§ 2000e-5, -16).

245. *See generally* Copus, *supra* note 149, at 13-23.